

**SJR**

**15**



Senator Loren Leman

## Sponsor Statement – SJR 15

SJR 15 proposes amendments to the Constitution of the State of Alaska that are designed to bring a measure of public involvement to the judicial selection process, and to increase the judicial branch's accountability to Alaskans. It does so in three ways.

First, SJR 15 allows the governor to fill court vacancies by appointing any attorney who meets the qualifications set out in the constitution and state statutes. This differs from the current system, in which the governor's choices are limited to only those nominees selected by the Alaska Judicial Council (AJC), a body which has little political accountability. Three of the six voting members on the AJC are selected by the Alaska Bar Association and are not required to undergo any type of confirmation process. The other three are non-attorney members appointed by the governor and subject to legislative confirmation. Since AJC members serve lengthy six-year terms, and only half are chosen by elected officials accountable to the voters, opportunities to change the composition of the council are exceedingly rare.

Under Article IV, Section 5 of the Alaska Constitution, the AJC is allowed to submit as few as two names to the governor to fill each judicial vacancy. Out of the thousands of attorneys in Alaska, the governor can choose only among those hand-picked few approved by AJC. This makes the governor's appointment power largely ceremonial. A committee of six persons exercises near total control over who is permitted to serve in one of the three branches of state government. There is no other example in our constitutional order of such enormous power being concentrated in the hands of a few non-elected functionaries. It is also noteworthy that three of the six AJC members are attorneys who are permitted to represent clients in the courtrooms of judges who may some day apply and be considered by the AJC to fill future vacancies on higher courts.

The second change proposed by SJR 15 is to require legislative confirmation of the governor's appointments to fill vacancies on the superior court and supreme court. This is similar to the federal system, in which the president's appointees to fill vacancies on the federal bench are confirmed by the U.S. Senate. Many other states also require some form of legislative confirmation, which allows the public to participate in the process through their elected representatives. Confirmation hearings provide a valuable opportunity for judicial nominees to be questioned about their philosophy on interpreting and applying statutory and constitutional law.

Finally, SJR 15 would increase the frequency of judicial retention elections. Currently, each superior court judge and supreme court justice is subject to approval or rejection by the voters at the first general election held more than three years after he or she is appointed. After the initial retention election, supreme court justices are up for approval or rejection every tenth year and superior court judges every sixth year. SJR 15 changes these intervals to six years for supreme court justices and four years for superior court judges. This change will provide Alaska voters more frequent opportunities to assess the performance of those who serve us in the judicial branch of government.

Prepared by Mike Pauley, Staff Aide to Senator Loren Leman (907-465-3841)  
Last updated: March 22, 2000

### 2000 Retention Election Candidates

| Judge  | Appointed | City/Judicial District |
|--|-----------|------------------------|
| 1. Supreme Court Justice Alexander O. Bryner*  | 01/24/97  | Anchorage/NA           |
| 2. Supreme Court Justice Dana Fabe*            | 01/26/96  | Anchorage/NA           |
| 3. Supreme Court Justice Warren W. Matthews    | 05/26/77  | Anchorage/NA           |
| 4. Court of Appeals Judge Robert G. Coats      | 07/30/80  | Anchorage/NA           |
| 5. Court of Appeals Judge David Stewart*       | 06/25/97  | Anchorage/NA           |
| 6. Superior Court Judge Thomas M. Jahnke       | 05/11/85  | Ketchikan/First        |
| 7. Superior Court Judge Larry Weeks            | 09/03/90  | Juneau/First           |
| 8. Superior Court Judge Larry C. Zervos        | 9/14/90   | Sitka/First            |
| 9. Superior Court Judge Richard H. Erlich      | 03/08/91  | Kotzebue/Second        |
| 10. Superior Court Judge Ben Esch*             | 02/16/96  | Nome/Second            |
| 11. Superior Court Judge Elaine M. Andrews     | 03/08/91  | Anchorage/Third        |
| 12. Superior Court Judge Harold M. Brown*      | 04/08/96  | Kenai/Third            |
| 13. Superior Court Judge Rene J. Gonzalez      | 11/08/84  | Anchorage/Third        |
| 14. Superior Court Judge Dan A. Hensley*       | 12/04/96  | Anchorage/Third        |
| 15. Superior Court Judge Donald D. Hoodwood    | 11/30/90  | Kodiak/Third           |
| 16. Superior Court Judge Karen L. Hunt         | 01/10/84  | Anchorage/Third        |
| 17. Superior Court Judge Jonathan H. Link      | 07/20/90  | Kenai/Third            |
| 18. Superior Court Judge Peter A. Michalski    | 01/31/85  | Anchorage/Third        |
| 19. Superior Court Judge Eric Sanders*         | 08/08/96  | Anchorage/Third        |
| 20. Superior Court Judge Eric Smith*           | 04/18/96  | Palmer/Third           |
| 21. Superior Court Judge Milton M. Souter      | 01/23/78  | Anchorage/Third        |
| 22. Superior Court Judge Sen K. Tan*           | 12/04/96  | Anchorage/Third        |
| 23. Superior Court Judge Fred Torrasi*         | 11/27/96  | Dillingham/Third       |
| 24. Superior Court Judge Michael L. Wolverton* | 12/04/96  | Anchorage/Third        |
| 25. Superior Court Judge Dale O. Curda         | 12/15/89  | Bethel/Fourth          |
| 26. Superior Court Judge Mary E. Greene        | 01/04/85  | Fairbanks/Fourth       |
| 27. Superior Court Judge Charles R. Pengilly*  | 11/07/97  | Fairbanks/Fourth       |
| 28. District Court Judge Peter G. Ashman       | 07/31/87  | Anchorage/Third        |
| 29. District Court Judge Joel H. Bolger*       | 07/03/97  | Valdez/Third           |
| 30. District Court Judge Natalie K. Finn       | 03/3/83   | Anchorage/Third        |
| 31. District Court Judge William H. Fuld       | 03/31/83  | Anchorage/Third        |
| 32. District Court Judge Stephanie Joannides   | 10/28/94  | Anchorage/Third        |
| 33. District Court Judge Suzanne Lombardi*     | 07/03/97  | Palmer/Third           |
| 34. District Court Judge James N. Wanamaker    | 08/13/93  | Anchorage/Third        |
| 35. District Court Judge Mark I. Wood          | 01/21/93  | Fairbanks/Fourth       |
| 36. District Court Judge (Vacant)*             |           | Fairbanks/Fourth       |

\* Indicates first time judges for retention in current position.

legislature. The duration of such appointments shall be prescribed by law

## ARTICLE IV. THE JUDICIARY.

**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.

### 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.

**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.

**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.

**SECTION 5. NOMINATION AND APPOINTMENT.** The governor shall fill any va-

cancy 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 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 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 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 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 10. COMMISSION ON JUDICIAL CONDUCT.** The Commission on Judicial Conduct shall consist of nine members, as follows: three persons who are justices or judges of state courts, elected by the justices and 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 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 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 13. COMPENSATION.** Justices, judges, and members of the judicial council and the Commission on Judicial Qualifications shall receive compensation as prescribed by law. Com-

penensation 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 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 filling for another elective public office forfeits his judicial position.

**SECTION 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 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.

## ARTICLE V. SUFFRAGE AND ELECTIONS.

**SECTION 1. QUALIFIED VOTERS.** Every citizen of the United States who is at least eighteen years of age, who meets registration residency requirements which may be prescribed by law, and who is qualified to vote under this article, may vote in any state or local election. A voter shall have been, immediately preceding the election, a thirty day resident of the election district in which he seeks to vote, except that for

# SENATE COMMITTEE REPORT First Committee of Referral

DATE: 3/5/99

FURTHER: Finance

Date of 5-Day Notice: \_\_\_\_\_  
(in accordance with Uniform Rule 23)

DATE TURNED  
IN TO OFFICE: \_\_\_\_\_

Judiciary Committee considered

SENATE JOINT RESOLUTION NO. 15

Proposing amendments to the Constitution of the State of Alaska relating to the appointment and confirmation of supreme court justices and superior court judges and to approval or rejection of justices and judges during certain general elections.

and recommends:

- be replaced with \_\_\_\_\_ CS SR 15 (JUD)
- adopt previous \_\_\_\_\_ CS \_\_\_\_\_
- attached amendment(s)
- adopt Letter of Intent by \_\_\_\_\_ Committee
- further referral to the \_\_\_\_\_ Committee

- Senate Bill:**  
 same title  
 new title  
**House Bill:**  
 same title  
 technical title  
 new: SCR# \_\_\_\_\_

| SIGNING <u>DO</u> PASS      | DP | OTHER RECOMMENDATIONS | NR | DNP | AM |
|-----------------------------|----|-----------------------|----|-----|----|
| <i>Rich Halford</i>         | ✓  | <i>[Signature]</i>    | ✓  |     |    |
|                             |    |                       |    |     |    |
|                             |    |                       |    |     |    |
|                             |    |                       |    |     |    |
|                             |    |                       |    |     |    |
| CHAIR: <i>Adrian Taylor</i> | ✓  | CHAIR:                |    |     |    |

**NEW FISCAL NOTE(S):**

| Department | Date | Zero | Fiscal |
|------------|------|------|--------|
|            |      |      |        |
|            |      |      |        |
|            |      |      |        |
|            |      |      |        |
|            |      |      |        |
|            |      |      |        |

**PREVIOUS FISCAL NOTE(S):\***

| Department | Date | Zero | Fiscal |
|------------|------|------|--------|
|            |      |      |        |
|            |      |      |        |
|            |      |      |        |
|            |      |      |        |
|            |      |      |        |
|            |      |      |        |

APPROPRIATION -- no fiscal note

\*include fiscal notes accompanying Governor's bill

1-LS0596H

Luckhaupt

3/31/00

*As Adopted and  
Amended  
3/29/00*

**CS FOR SENATE JOINT RESOLUTION NO. 15(JUD)**

**IN THE LEGISLATURE OF THE STATE OF ALASKA**

**TWENTY-FIRST LEGISLATURE - SECOND SESSION**

**BY THE SENATE JUDICIARY COMMITTEE**

**Offered:**

**Referred:**

**Sponsor(s): SENATORS LEMAN, Donley**

**A RESOLUTION**

1 **Proposing an amendment to the Constitution of the State of Alaska relating to**  
2 **when supreme court justices and superior court judges are to be subject to**  
3 **approval or rejection following initial approval.**

4 **BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

5 **\* Section 1. Article IV, sec. 6, Constitution of the State of Alaska, is amended to read:**

6 **Section 6. Approval or Rejection.** Each supreme court justice and superior  
7 court judge shall, in the manner provided by law, be subject to approval or rejection  
8 on a nonpartisan ballot at the first general election held more than three years after  
9 [HIS] appointment. Thereafter, each supreme court justice shall be subject to approval  
10 or rejection in a like manner every sixth [TENTH] year, and each superior court judge,  
11 every fourth [SIXTH] year.

12 **\* Sec. 2.** The amendment proposed by this resolution shall be placed before the voters of  
13 the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the  
14 State of Alaska, and the election laws of the state.



*Alaska Action Trust*

P.O. Box 102323 • Anchorage, Alaska 99510  
Office: 540 "L" Street, Suite 206 • Anchorage, AK 99501  
(907) 258-4040 • FAX (907) 276-7185

RECEIVED

MAR 16 1999

Ans'd.....

March 12, 1999

Senator Robin Taylor  
State Capitol  
Juneau, Alaska 99801-1182

Dear Senator Taylor:

The Alaska Action Trust is very interested in SJR 15, *proposing amendments to the Constitution of the State of Alaska relating to the appointment and confirmation of supreme court justices and superior court judges and to approval or rejection of justices and judges during certain general elections.*

We would be most appreciative of some advanced scheduling notice of this resolution in the Senate Judiciary Committee so that we may alert and prepare our members and others who share our concerns about this proposed legislation.

Thank you for your consideration of this request.

Sincerely,



Jan Bouch  
Executive Director

Cc: Russell Winner, Chair



ALASKA COURT SYSTEM  
State of Alaska Court System  
Office of the Administrative Director

Stephanie J. Cole  
Administrative Director

303 K Street  
Anchorage, Alaska 99501  
(907) 264-0547  
(907) 264-0881  
scole@courts.state.ak.us

## **THE ALASKA COURT SYSTEM OPPOSES SJR 15**

The Alaska Legislature is currently considering SJR 15, which would make three significant changes to the current system of selecting and retaining judges:

- SJR 15 would require legislative confirmation of supreme court justices and superior court judges. The proposed system could add months to the selection process, creating a real danger that extended judicial vacancies would result in delays in the resolution of court cases. The changes would also pull judicial candidates into the realm of partisan politics and threaten judicial independence.
- SJR 15 would eliminate the Judicial Council's role in the judicial selection process. The removal of the Judicial Council from the selection process eliminates the stringent, merit-based screening currently in place.
- SJR 15 would shorten the periods between retention elections for supreme court justices and superior court judges. The proposed shortened retention periods would increase costs to the state, lower voters' scrutiny of individual judges, and are not in line with retention terms in other merit selection states.

The changes proposed in SJR 15 would erode the balance of power among the three branches of government and weaken Alaska's nationally-recognized system of merit-based selection of judges.

- **Alaska's current merit-based selection process is rigorous and non-political**

Unlike the federal court system, Alaska's current structure for selection of judges is a rigorous, merit-based process. The drafters of the Alaska Constitution resoundingly rejected the idea of electing judges by a vote of 51-2, in favor of a method with a minimum of political consideration or partisanship. Alaska was only the third state to use merit selection, but today 35 states have some method of merit selection. The national movement is toward judicial selection processes that are less political, not more.

Under our current selection system, the Alaska Judicial Council recruits applicants for judicial vacancies, investigates and screens those applicants on the basis of their demonstrated abilities to perform judicial duties, and forwards names of qualified applicants to the Governor, who must make a final selection from only those names sent by the Council. The Judicial Council is a nonpartisan commission of lawyers and non-lawyers, who examine each applicant's education, employment history, activities, credit and criminal history, bar discipline history, client grievances and conflicts of interest. Only those candidates who are deemed most qualified after this extensive investigation are forwarded to the Governor. This process does not involve any consideration, or even identification, of the partisan political affiliations of the judicial candidates.

In the final step of the process, the Governor may only choose from the applicants found most qualified by the Council. Prior governors who have been unhappy with choosing only from among the applicants sent forward by the Judicial Council have requested additional names, but the Council has consistently declined to add applicants at the Governor's request. In the past, there has been no consistent tradition of the Governor

appointing on a partisan basis; judges have been appointed who have had different political affiliations than the Governor.

- **A legislative confirmation requirement would increase judicial vacancy periods and aggravate court delay**

The provisions of SJR 15 undermine the current process, and would have a negative impact on both court operations and service to the public. Currently, approximately six months pass between the time applications for the judgeship are solicited and the Governor's selection of the successful candidate. Under the changes set forth in SJR 15, the Governor's appointee will not be able to take office until after legislative confirmation. Depending upon the time of year of appointment (which might be when the legislature is not in session) and upon the willingness of the legislature to act swiftly in holding confirmation hearings, many months could be added to the period of judicial vacancy.

An extended judicial vacancy has a high impact on any court's ability to do its work. In the federal system, legislative reluctance to hold hearings and to confirm judicial appointments has created a crisis for the federal judiciary, as cases are backlogged because of the lack of judicial resources to decide them. Historically, appointment delays have been aggravated in the fourth year of a presidential term, when confirmation is often withheld by a Senate controlled by an opposition party. At the state level, should the legislature decide to disapprove an appointment, a lengthy period of delay would result, as an entirely new selection process might be required.

- **A confirmation requirement may affect the pool of judicial applicants**

Lengthening the time between application and assumption of judicial office will also have a disproportionate impact on attorneys in the private sector. Applying for a judgeship is already a disruptive process for private sector attorneys, who must make hard decisions about pursuing cases and accepting new clients during such an extended period of uncertainty. Public sector attorneys, who do not have to worry about maintaining a client base, and sitting judges who are seeking appointment to a higher judicial seat, will have a great advantage. An often-expressed goal is that our judges would have histories which reflect both private and public sector experience, and this goal would not be promoted by the changes proposed in this legislation.

- **SJR 15 erodes Judicial Independence**

The greatest danger in this proposed legislation is its erosion of judicial independence. As has been seen in much-publicized federal confirmation hearings in recent years, judicial candidates who enter the legislative realm are often subject to the currents of partisan politics. The Canons of Judicial Ethics do not allow judicial candidates to "...make pledges or promises of conduct in judicial office other than to faithfully and impartially perform the duties of the office," nor may a judicial candidate, "make statements that commit or appear to commit the candidate to a particular view or decision with respect to cases, controversies or issues that are likely to come before the court." It is a fundamental principle of the law that a judge has the responsibility to weigh the facts of each case impartially, and to apply the law to those facts, to reach a decision. To the extent that demands are made in a

confirmation process, as they often are, that a judicial candidate commit to a particular point of view of controversial issues, a judge who emerges from the process can easily be perceived as biased towards a particular point of view. If a judicial candidate is championed by one political faction, and opposed by another, the judicial candidate's ability to handle controversies involving those parties later in the courtroom is severely compromised.

Edward W. Madiera, Jr., the chair of the ABA's Commission on Separation of Powers and Judicial Independence, has noted that "Judicial independence is not for the protection of judges, but for the protection of the public." Each person who brings a case in Alaska's courts should feel that his or her case will be measured on its individual merits, by a judge who is free from bias and political obligation. Our current merit-based system, which keeps judicial candidates out of partisan politics and yet empowers the voters to remove judges in retention elections, is one of the best in our country. It encourages the appointment of well-qualified, independent, and courageous judges. The changes proposed in SJR 15 would be a step backward for justice in Alaska.

- **Shortening the periods between retention elections increases costs and lowers voters' scrutiny of individual judges. The proposed periods are not in line with other merit selection states.**

The people of Alaska have the opportunity to approve or reject judges at periodic retention elections. Alaska has the nation's most extensive system for seeking public input on retention. The Judicial Council surveys lawyers, law enforcement officers, jurors, court employees and children's caseworkers. It looks at a judge's disciplinary record, disqualifications from assigned cases, appellate record, and the evaluation by the

CourtWatch program. The Judicial Council holds public hearings to allow people to testify about their experiences with judges who are standing for retention. Most of this information is made available to the voters. A judge will be voted out of office if enough voters are unhappy with the judge's performance.

The following periods between retention elections are established in the Alaska Constitution:

- Supreme Court Justice: At first general election held more than three years after appointment, and then every 10<sup>th</sup> year
- Superior Court Judge: At the first general election held more than three years after appointment, and then every 6<sup>th</sup> year

**Alaska's Constitution strikes the right balance between public accountability and judicial independence.** Alaska's Constitutional delegates worked hard to create a judicial merit and selection system that delicately balances the public's right to an accountable judiciary with the important goal of a strong and independent judiciary. The current proposal to change retention terms would upset that balance and damage the integrity of Article IV. The convention minutes show that the drafters specifically considered and rejected a proposal to decrease the retention term for supreme court justices to six years.

**Shortening retention terms would decrease voters' scrutiny of individual judges.** Shortening retention terms would cause more judges to be on the ballot at each general election. Voters are bombarded with information about candidates and ballot propositions. Voters have limited time to study information on judges standing for retention, and increasing the number of judges on the ballot would only exacerbate that problem.

**Shorter retention terms increase costs.** The judicial evaluation process is integral

to retention elections. The Judicial Council provides voters with important information on the performance of each judge or justice, so that voters can make informed retention decisions. Increasing the frequency of retention elections would increase the number, and thus the cost, of these evaluations.

**Alaska's current retention terms are in line with retention terms in other merit selection states.** Twenty other states have merit selection and retention laws similar to Alaska's. Retention terms in many of those states are similar to or longer than Alaska's current terms. Only three of those states have terms even approaching the four years proposed in SJR 15. No other merit selection states have terms as short as those proposed by SJR 15.

Retention terms in Colorado, South Carolina and Utah are identical to Alaska's. Six states have retention terms longer than Alaska's: California (12 years supreme, 6 years trial court), Hawaii (10 year terms), Indiana (10 years supreme court, 6 years superior courts), Maryland (10 years), Massachusetts (to age 70) and Missouri (12 years supreme court, 6 years circuit court).

Retention terms in eight other states are significantly longer than the terms proposed in SJR 15: Florida (6 years supreme, 6 years circuit), Iowa (8 years, 6 years), Nebraska (6 years), New Mexico (8 years for appellate, 6 years for district), South Dakota (8 years for supreme court), Tennessee (8 years supreme court), Vermont (6 years), Wyoming (8 years for supreme, 6 years for district court).

Only three states have retention terms even approaching the terms proposed in SJR 15: Arizona (6 years supreme, 4 years superior), Kansas (6 years supreme court, 4 years

district court), Oklahoma (6 years supreme court, 4 years district court),

**Shorter terms will tend to discourage the most highly qualified people from seeking judicial office.** Short-term positions are inherently less attractive because of the lack of job security. Highly skilled attorneys with well established practices will be less inclined to leave their private-sector positions knowing that they must stand for retention at four year intervals.

**Voters already have an early opportunity to vote on supreme court justices and superior court judges.** Alaska's retention system requires newly appointed superior court judges and justices to first stand for retention after a short, probationary term (three years after appointment). This evaluation period gives judges early feedback on their performance and gives voters an early chance to unseat them if necessary.

(5) JUD

Position paper on SJR 15, Legislative Confirmation Of Judges; Shortening  
of Retention Election Intervals

Prepared For The Alaska Action Trust By Les Gara, 258-0704

SJR 15 changes the constitutional protection against politicized judges. It threatens to politicize the judiciary. A version of this bill has failed the past two legislative sessions, and has been opposed by both Republican and Democratic Attorneys' General. It should be opposed again.

In 1955 the fifty-five delegates to Alaska's Constitutional Convention decided judges should be appointed based on their competence and independence, and not their allegiance to the majority party in the Legislature. Today judicial candidates are reviewed by our citizen-run Judicial Council. The Governor can only choose from candidates recommended by the Judicial Council. SJR 15 would prevent judges from being appointed unless they first receive majority support from the Legislature, presumably after they prove at hearings that they will promote the sitting Legislature's agenda.

The Delegates to our Constitutional Convention considered the arguments that have resurfaced today. They agreed with a study commissioned by our Statehood Committee in 1955. The study concluded that an "independent judiciary is one of the truly important features of American democratic government" and that judges "should be independent of political and personal pressures." The Delegates voted in favor of the Judicial Council process over a process that required candidates to receive the political blessing of the Legislature. The Statehood Committee Study correctly recommended the plan adopted at the Constitutional Convention, known as the "Missouri Plan", as a way to curb government's "powers to fill the judiciary with political hacks."

It is predictable that half of all parties will disagree with what a judge does. Not surprisingly, some in the Legislature have been irritated by recent decisions. That is inevitable, but is not a reason to let the Legislature take control of the judiciary. What irritates one side of the aisle today will be followed by something that irritates the other side of the aisle next year. The majority party one-year will be the minority party next year. The uniqueness of our State Constitution is that it creates a judiciary that does not shift with political winds. If we want impartial judges, we should not require legislative hearings and approval of judicial candidates.

The current proposal is shortsighted. Today you might agree with the political party that controls the Legislature, and that would control judges under the proposed constitutional amendments. But over time, different parties will control the Legislature. Then judges will issue political opinions you don't like. It is better to have a judge decide

1242 W 10<sup>th</sup> Ave  
Anch 99501

a case impartially than to have a judge who decides a case based on a pre-existing political agenda. The value of the Constitution is that it protects us over the long run, and from shortsighted proposals aimed at political gain for the party in power on any particular day.

Likewise, the Delegates to the Convention believed that judges, to be independent, should not have to face the prospect of too-frequent voter approval. Thus, the delegates provided that Superior Court judges should run every 6 years, and that Supreme Court judges should run every 10. They should not run on a consistent cycle, every 4 years, with political candidates. That, too, threatens to pressure judges to disregard the nuances of the facts and law they are presented with in favor of rulings that make good, popular headlines and sound bites. The retention vote cycles should not be reduced to 6 and 4 years, respectively, as SJR 15 proposes.

The proposals that are being made today are not new. They were rejected forty years ago. Delegates to the Constitutional Convention spoke against any requirement that candidates receive a Legislative stamp of approval. They agreed with the sentiment that: "all of us here want an independent judiciary, a judiciary that will not be swayed by the public will at any particular moment, a judiciary that will not be subject to any political pressure . . . [W]e have taken the best means devised yet to appoint and select qualified judges and to keep judges free from outside political pressures and to get rid of judges who are not able to properly do their job."

Justice occurs when a judge considers a case fairly and impartially. Injustice occurs when judges ignore the facts and law in favor of a political agenda they have promised to promote. Our system is better today than it will be if SJR 15 finds its way into the constitution.

1-LS0596G  
Luckhaupt  
3/17/00

*adopted  
3/29/00  
amended*

**CS FOR SENATE JOINT RESOLUTION NO. 15( )  
IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTY-FIRST LEGISLATURE - SECOND SESSION**

BY

Offered:  
Referred:

Sponsor(s): SENATORS LEMAN, Denley

**A RESOLUTION**

1 Proposing an amendment to the Constitution of the State of Alaska requiring  
2 supreme court justices and superior court judges to be subject to approval or  
3 rejection every four years following initial approval.

4 **BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

5 \* Section 1. Article IV, sec. 6, Constitution of the State of Alaska, is amended to read:

6 Section 6. Approval or Rejection. Each supreme court justice and superior  
7 court judge shall, in the manner provided by law, be subject to approval or rejection  
8 on a nonpartisan ballot at the first general election held more than three years after  
9 [HIS] appointment. Thereafter, each supreme court justice <sup>6 yrs.</sup> and each superior court  
10 judge shall be subject to approval or rejection in a like manner every <sup>4 yrs</sup> fourth [TENTH]  
11 year [, AND EACH SUPERIOR COURT JUDGE, EVERY SIXTH YEAR].

12 \* Sec. 2. The amendment proposed by this resolution shall be placed before the voters of  
13 the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the  
14 State of Alaska, and the election laws of the state.

*Kansas*

## **The Alaska Judicial Council opposes shortening retention terms to four years as proposed by SJR 15**

**Alaska's Constitution strikes the right balance between public accountability and judicial independence.** Even a cursory review of the minutes of the Constitutional convention shows that Alaska's Constitutional delegates worked hard to create a judicial merit selection system that delicately balances the public's right to an accountable judiciary with the important goal of an independent judiciary able to protect the Constitutional rights of citizens. The current proposal to change retention terms would upset that balance and damage the integrity of Article IV. Indeed, the drafters of our constitution specifically considered and rejected lowering the retention term for supreme court justices to even six years. The American Judicature Society recommends retention terms of at least eight years.

**Shorter terms discourage qualified attorneys from applying.** Shorter retention terms, with the lesser job security they entail, will discourage highly qualified judicial applicants. This will be especially true for experienced and successful private practitioners. The result of SJR 15 may be a lesser qualified judiciary with less experience representing private citizens.

**Increased numbers of judges on the ballot decrease voters' scrutiny of individual judges.** At each general election voters are bombarded with information about candidates and ballot propositions leading to what are referred to as "bed-sheet ballots." Voters already have limited time to study information on judges standing for retention. (There are 33 judges now scheduled to be on the ballot this year.) Increasing the numbers of judges on the ballot would only exacerbate that problem.

**Shorter retention terms increase costs.** An integral part of retention elections is the retention evaluation process. The Judicial Council gathers extensive information on each judge or justice and provides that information to the voters so that they can make informed retention decisions. Increasing the frequency of retention elections would increase the costs of the evaluation or, in the alternative, lead to a less intensive evaluation. Election costs also would increase.

**Alaska's current retention terms are in line with retention terms in other merit selection states.** Twenty other states have merit selection and retention laws similar to Alaska's. Retention terms in many of those states are similar to or longer than Alaska's current terms, while only three of those states have terms even approaching the four years proposed in SJR 15. No other merit selection states have terms as short as proposed by SJR 15.

Retention terms in Colorado, Indiana, South Carolina and Utah are identical to Alaska's. Five states have longer retention terms longer than Alaska's: California (12 years supreme, 6 years trial court), Hawaii (10 year terms), Maryland (10 years), Massachusetts (to age 70) and Missouri (12 years supreme court, 6 years circuit court).

*amend*

Retention terms in eight other states are significantly longer than the terms proposed in SJR 15: Florida (6 years supreme, 6 years circuit), Iowa (8 years, 6 years), Nebraska (6 years), New Mexico (8 years for appellate, 6 years for district), South Dakota (8 years for supreme court), Tennessee (8 years supreme court), Vermont (6 years), Wyoming (8 years for supreme, 6 years for district court).

Only three states have retention terms even approaching the terms proposed in SJR 15: Arizona (6 years supreme, 4 years superior), Kansas (6 years supreme court, 4 years district court), Oklahoma (6 years supreme court, 4 years district court).

**The Judicial Council's thorough evaluation process is more effective in ensuring public accountability than shorter retention terms.** Alaska has a system of judicial performance evaluation that is used as a model throughout the United States and in many other countries. The Judicial Council has created a system in which more than 7,500 people in 1998 had an opportunity to critique judicial performance. Citizens commenting included jurors, citizens at public hearings, police, probation officers, social workers, court employees, attorneys and independent court watchers. Their input was summarized and considered by the Judicial Council along with detailed information about appellate affirmances and reversals, peremptory challenges, promptness, conflicts of interest and other aspects of performance. The information was available throughout the state in news articles, on the Internet, in the Alaska Voters' Pamphlet and through other media.

**The Judicial Council already conducts mid-term evaluations of judges.** The Council conducts attorney and peace officer surveys every two years of judges who are on the ballot that year, or who will be on the ballot 2 ½ years in the future. The mid-term evaluation gives judges a chance to improve performance and the Council advance notice of any problems.

**Voters already have an early opportunity to vote on supreme court justices and superior court judges.** Alaska's retention system requires newly appointed superior court judges and justices to first stand for retention after a short, probationary term (three years after appointment). This evaluation period gives judges early feedback on their performance and gives voters an early chance to assess the judges.

**Conclusion.** Alaska already has a system that emphasizes both judicial accountability and judicial independence. A thorough evaluation gives Alaska voters more information on judicial performance than is available anywhere else in the world. The judicial independence so prized by our constitutional drafters allows courts to protect the constitutional rights of Alaskans. Shortening retention terms as proposed in SJR15, shorter than in any merit selection state, will upset this delicate balance. The change is unnecessary, expensive, and would discourage quality judicial applicants. Ultimately, the goal of the Judicial Council is to maximize judicial excellence. This proposal is counterproductive to that goal.

# Above the Law

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 consti-

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

tution, 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,

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 confronting 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.

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.

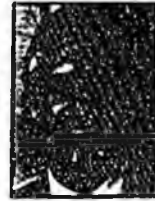
The lower Court ruling is being appealed to the Pennsylvania Supreme Court, which has an activist agenda on par with the Commonwealth Court's. The Pennsylvania Supreme Court has the constitutional authority to suspend any statute passed by the legislature that it believes impinges upon its rulemaking 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,



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

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.

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 dis-

tricts 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,



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

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.

"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 twofold. 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." ■



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

BY JOHN LEO

# Steamrolled and bulldozed

Justice Ruth Bader Ginsburg made a revealing comment recently at the University of Virginia law school. She said she would still like to see the Equal Rights Amendment in the Constitution as "a symbol" for her granddaughter, but it doesn't really matter because "there is no practical difference between what has evolved and the ERA."

In other words, the voters said no, but the courts overrode them and installed the ERA anyway. "How We Got the ERA" is the lead article in the spring issue of the *Women's Quarterly*, a publication of the Independent Women's Forum and an opponent of the feminist establishment. The article's subtitle tells the story: "The people rejected it, but the Supreme Court steamrolled it into the Constitution anyway." The word "steamrolled" echoes Justice Antonin Scalia's complaint that one of the court's rulings was a "bulldozer of social engineering."

How did this happen? In part, it is the natural result of the interplay between litigating lobbyists and judges who mostly share the same attitudes, social goals, and elite-law-school training. Justice Ginsburg has sat at both ends of the table in this cozy dialogue—first as a Columbia law professor who moonlighted as head of the ACLU's Women's Rights Project, later as the Supreme Court justice who wrote the VMI decision that ratcheted up the existing legal standard for any sex-based state action to a strict ERA level.

More broadly, the modern judiciary is the product of many trends—the rise of cynical, postmodern philosophies in the law schools; disgust with an increasingly venal and deadlocked political system; and the endless fallout from the landmark desegregation ruling in *Brown v. Board of Education*.

**Troubling legacy.** The lesson of *Brown*, alas, is not that an out-of-the-blue precedent-shattering decision is occasionally required, but that all precedents and traditions are suspect and can be overturned at any time by any court. And since nearly everybody agrees that *Brown* was correctly decided, it is almost impossible to make the case against the troubling legacy of *Brown* without criticizing *Brown* itself.

Conservatives and a few moderates tend to agree that the judiciary has vastly inflated its proper role and that a constitutional crisis may be at hand. If so, it is fair to say that conservatives have made a mess of coping with it. The heavily publicized articles in last November's issue of the conservative religious magazine *First Things* argued seriously and well that the courts have gone too far. But they were marred by several suggestions of civil disobedience and one of "morally justified rev-

olution." These ideas dominated news coverage and managed to change the subject. Instead of talking about judges, people began to talk about the mental state of some conservatives.

The campaign by Tom DeLay in the House of Representatives to impeach activist judges was worse. In three instances, DeLay wanted to impeach a judge on the basis of a single ruling made on the bench. Like the sign-it-or-else pledge against the confirmation of activist judges that is being circulated in the Senate, the DeLay effort has the whiff of the campaign against Communists in government in the 1940s and '50s.

Besides, nobody can clearly define what a "judicial activist" is and who may be guilty of the charge. As a result, vaguely liberal

judges are lumped with judges (some of them conservative) who are willing and eager to vote their biases from the bench. And most of the egregious activists have the wit not to reveal themselves in advance. As retired Judge Robert Bork says, "We usually discover what we've bought after the candidate is on the bench."

Some in Congress talk as though the main task is to stop the flow of hyperactivists to the bench. But the truth is that the imperial judiciary keeps expanding with ordinary Democratic and Republican nominees doing the work. A new report by the libertarian Institute for Justice concludes that Clinton nominees Ginsburg and Stephen Breyer are not flamethrowing activists—they are more restrained and less likely to strike down federal and state laws than their Republican colleagues on the court.

The problem is usually not the nominees but the legal culture they come from. That culture, vastly transformed in the last generation, is eager to solve social problems, addicted to rights-based claims, dismissive of religion, and dubious about the fairness of existing law. As Mary Ann Glendon of Harvard Law School wrote in *A Nation Under Lawyers*, the freewheeling impulses unleashed by the Warren court proved difficult to contain: "Many lawyers and laypeople began to imagine that wise judges in black robes could cure social ills. . . . The flight from politics turned into a stampede, as courts became alternatives to legislatures and judges began acting like executives and administrators."

This is the case that has to be made with the voters. It's not that some abstract "judicial activism" is a threat but that an elite legal culture has emerged, contemptuous of ordinary democracy and willing to handle things without all that old-fashioned messy involvement of the people. It may take time, but this is a message that can get through. ■



"An elite legal culture has emerged, contemptuous of ordinary democracy."

# Court's abuse of power invites public backlash

By SEN. LOREN LEMAN AT 3-4-98

On Feb. 25, the Alaska Legislature gathered in joint session to listen to the annual "State of the Judiciary" address, delivered by Warren Matthews, chief justice of Alaska. Aside from his request for additional funding and a concern about high caseloads in certain districts, Justice Matthews informed us that all is well with Alaska's court system.

Unfortunately, all is *not* well with Alaska's courts — and the problems will not be cured with additional money. Alaska's Constitution created three independent branches of government: the legislative, executive and judicial. In theory, the three branches are equal. In reality, the judiciary's power has crept far beyond its original mandate, to the extent that the court is clearly encroaching on the legitimate authority of the legislative and executive branches. This trend should concern Alaskans, because the judiciary is the least accountable to the public.

The Supreme Court's 1997 decision in *Mat-Su Coalition for Choice v. Valley Hospital Association* is only the most recent example of the court's abuse of power. Here are the facts: In 1992, the operating board of Valley Hospital in Palmer voted to no longer permit elective abortions. Exceptions were allowed for pregnancies endangering the life of the mother, pregnancies caused by an act of rape or incest, and also in cases of severe fetal deformity.

Valley Hospital is a private, non-profit corporation managed by an operating board that is elected by members of the Valley Hospital Association (VHA). The operating board no doubt felt it was exercising a valid right because an Alaska statute enacted in 1970 specifically states "Nothing in this section requires a hospital or person to participate in an abortion. . ." [AS 18.16.010(b)].

Incredibly, Justice Matthews and three of his colleagues on the Alaska Supreme Court declared that Valley Hospital's policy is unconstitutional. Under court order, Valley Hospital is now being forced to provide abortions, in violation of the consciences of its directors, members and employees.

As for the Legislature's 1970 law protecting the right of hospitals not to provide abortions, the court has declared the law to be "unconstitutional" at least as it applies to Valley Hospital and other "quasi-public" institutions. Although Val-



ley Hospital is clearly a private health care institution, the court declared it to be a quasi-public institution because, like virtually all hospitals, it receives some government funds.

Thus, the "right to have an abortion" has now undergone a terrifying evolution, courtesy of the Supreme Court. It has now become a weapon to coerce people and institutions to participate in what many consider to be an act of violence against an unborn child.

The arrogance displayed in the Valley Hospital decision is unfortunately not an isolated incident. Many judges are no longer content to interpret the law. Instead, they are busy writing the law — legislating from the bench, in violation of their constitutional mandate.

This trend recently came under sharp criticism from no less an authority than U.S. Supreme Court Justice Antonin Scalia. "What secret knowledge, one must wonder, is breathed into lawyers when they become justices of this court?" asked Justice Scalia. "Day by day, case by case, (the court) is busy designing a constitution for a country I do not recognize."

Justice Scalia's comments ring true for me. I am a lifelong Alaskan, yet I do

not recognize the Alaska which the court is attempting to create when it renders decisions such as *Valley Hospital*. It is a place alien to the values of my family and most Alaskans.

Left unchecked, the courts acquire frightening power. This was clearly recognized by the 12th chief justice of the U.S. Supreme Court, Harlan Fiske Stone (1872-1946). Justice Stone wrote: "While unconstitutional exercise of power by the executive or legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of restraint."

In their lack of restraint, the Alaska courts have ignored Justice Stone's advice. Not surprisingly, the Legislature is considering HJR47, which would require legislative confirmation for appointees to the Supreme Court, the Court of Appeals and to the Alaska Judicial Council.

If the court cannot resist the urge to trample on the rights of the people, its power must be checked by the voters and their elected representatives.

Loren Leman, Republican, represents District C, which includes parts of west and north Anchorage and Elmendorf Air Force Base.