

# MERIT SELECTION OF JUDGES IN ALASKA: THE JUDICIAL COUNCIL, THE INDEPENDENCE OF THE JUDICIARY, AND THE POPULAR WILL

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## ABSTRACT

*The judicial selection and retention provisions of the Alaska Constitution, found in Article IV, achieve a delicate and remarkably successful balance between competing interests. The purposes of this article are to describe this constitutional plan (called “merit selection” because it begins with nomination based on merit alone), explain why the founders adopted it, examine historical challenges to it, and assess its performance on the 60<sup>th</sup> anniversary of Alaska statehood.*

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## I. MERIT SELECTION OF JUDGES

### A. Nomination by the Judicial Council

The process of judicial selection in Alaska begins with nomination by the Judicial Council.<sup>1</sup> The Council is a seven-member body, composed of three lawyers chosen by the Board of Governors of the Alaska Bar Association; three public members appointed by the governor and confirmed by the legislature; and the chief justice.<sup>2</sup> The members of the Council serve six-year terms, staggered to prevent a single governor or Board of Governors from exercising excessive authority over the Council's composition.<sup>3</sup> This first step in the judicial selection process focuses on merit: Constitutional Convention delegate Ralph Rivers stated that "the judicial council will seek for the best available timber" to send to the governor.<sup>4</sup> Delegate Frank Barr noted the attributes that the Council would seek in a judge: "He should have in qualifications, first, ability and experience. Secondly, he should have integrity and a willingness to render impartial decisions."<sup>5</sup> The Council must nominate at least two<sup>6</sup> applicants for the governor's consideration.<sup>7</sup>

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1. ALASKA CONST. art. IV, § 5.

2. ALASKA CONST. art. IV, § 8. For an in-depth explanation of Alaska's system, see Antonia Moras, *A Look at Judicial Selection in Alaska*, 21 Alaska Justice Forum #3: 1, 7-9.

3. *Id.* at 13.

4. Proceedings of the Alaska Constitutional Convention [hereinafter PACC], at 594, available at <http://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Proceedings/Proceedings%20-%20Complete.pdf>.

5. The Judicial Council has incorporated precisely these attributes in the polling of attorneys that it conducts on all judicial applicants. *Judicial Selection Procedures*, ALASKA JUD. COUNCIL, <http://www.ajc.state.ak.us/selection/procedures/procedures> (last visited Aug. 28, 2018). The Council polls on professional competence, integrity, fairness, temperament, and suitability of the applicant's legal experience for the position sought. *Id.*

6. The delegates debated whether the Council should be required to nominate a greater number of applicants, but settled on two nominees in recognition of Alaska's small population of attorneys and the possible difficulty of finding qualified candidates. PACC, *supra* note 4, at 585 (remarks of Delegate McLaughlin) ("We figured because of the size of the Territory, initially it would be preferable [to require only] two names."). This has proven to be a well-founded concern, especially in very sparsely populated rural areas. Twelve times since 1976 the Judicial Council, after advertising a vacancy, has been unable to forward two names to the governor. E-mail from Susanne DiPietro, Exec. Dir., Alaska Jud. Council, to the authors (August 27, 2018, 10:20 AKST) (on file with the authors). On five occasions only one of the applicants was deemed qualified. *Id.* On three occasions no applicants were deemed qualified. *Id.* On four occasions the Council's meeting was postponed because too few people applied. *Id.* In each instance the Council was required to re-initiate the process. *Id.*

7. The Council's bylaws, based on the record of the Constitutional

## B. Appointment by the Governor

The second phase of the selection process is appointment by the governor, who is limited in his or her choice to those persons nominated by the Judicial Council.<sup>8</sup> An enduring concern of the majority of the delegates was injecting politics into the selection of judges.<sup>9</sup> At the same time, the delegates recognized that the governor, as representative of the people, should have an important role in the appointment process. As delegate Ralph Rivers expressed it, in supporting the notion that the governor should make the appointment (rather than, as proposed by delegate Victor Rivers, the senate doing so), appointment by the governor “is positive with some decency of approach and thinking the [J]udicial [C]ouncil will seek for the best available timber, and we take a bow to the governor in taking his choice of [the] persons that are nominated . . . .”<sup>10</sup>

Expressed another way, the delegates recognized that elections have consequences. While ever vigilant against the politicization of the process of selecting judges,<sup>11</sup> they were prepared to give the governor the job of selecting between those nominees who were the most highly qualified.

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Convention, require it to “select two or more candidates who stand out as the most qualified under the criteria set out in Article I, Section 1 of these bylaws.” ALASKA JUD. COUNCIL, Bylaws, Article VII, § 4. Those criteria are the five listed in note 5, above, plus these two: “judgment, including common sense,” and “demonstrated commitment to public and community service.” *Id.*

8. ALASKA CONST. art. IV, § 5.

9. PACC, *supra* note 4, at 584 (statement of G. McLaughlin); PACC, *supra* note 4, at 589 (statement of W.O. Smith); PACC, *supra* note 4, at 589 (statement of W. Taylor); PACC, *supra* note 4, at 593–94 (statement of R. Rivers). In the Staff Paper prepared by Public Administration Service for the Delegates to the Alaska Constitutional Convention, found in Constitutional Studies, Alaska Constitutional Convention, v. 2, the authors concluded their discussion of selection methods with this observation:

Certainly the judge should be independent of political and personal pressures. This concept of the independent judiciary is one of the truly important features of American democratic government. How best to obtain and retain that independence for the judges of the State of Alaska is based in no small measure on the method of selecting judges which is chosen by the Alaskan Constitution.

PUBLIC ADMINISTRATION SERVICE, CONSTITUTIONAL STUDIES: THE JUDICIAL DEPARTMENT, VOL 2, § VII, at 31 (1955).

10. PACC, *supra* note 4, at 594 (statement of R. Rivers).

11. As Delegate Edward V. Davis expressed the sentiment of the body: “[W]ithout qualification, I believe I could say 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 political pressure, a judiciary that will not be subject to pressure from the executive branch of the government.” PACC, *supra* note 4, at 598 (statement of E. Davis).

### C. Retention (or Rejection) by the Electorate

The third phase in the merit selection process is the “democratic check” provided by the retention election provisions of Section 6 of Article IV.<sup>12</sup> If the first phase of the selection process was to be based on merit, and the second a recognition of the appropriate influence of political considerations in the process, the third phase reflects the founders’ belief that the electorate should play a role in determining whether a judge should remain on the bench.

As the Chairman of the Committee on the Judiciary, George McLaughlin, stated during debate on the provision, “Roughly, three and one-half or four years later, the judge is required, every judge without exception, is required to go on the ballot for approval by the voters. . . . The only requirement on a nonpartisan ballot could be, ‘Shall Judge Blank be retained in office?’”<sup>13</sup> Chairman McLaughlin noted that the plan represented a compromise:

It is the best compromise and the best solution to a vexing problem between those who feel we should have lifetime tenure so the judges can be absolutely independent or whether we should have a short term so the judges could be subject to the popular will. The popular will should be expressed even in the control of the judiciary, but the way to control it is to put the judge on a nonpartisan ballot. . . . He is running against himself, he is not running against someone else.<sup>14</sup>

The retention process is open, exhaustive, and invites public participation. Alaskan voters have access to a truly impressive amount of information in deciding whether to retain a judge. The Judicial Council investigates the performance of every judge on the ballot, surveying every lawyer in the state, as well as all police officers, social workers, court employees, and jurors who have appeared in the judge’s court.<sup>15</sup> The Council also conducts public hearings<sup>16</sup> and interviews litigants who have

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12. “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.” ALASKA CONST. art. VI, § 6. The legislature subsequently provided for retention elections for the legislatively-created district court, ALASKA STAT. § 22.07.070 (2016), and court of appeals, ALASKA STAT. § 18.85.050 (2016).

13. PACC, *supra* note 4, at 586 (statement of G. McLaughlin).

14. *Id.*

15. *Retention Evaluation Procedures*, ALASKA JUD. COUNCIL, <http://www.ajc.state.ak.us/evaluating-judges/retention-evaluation-procedures> (last visited Aug. 28, 2018).

16. *Id.*

been in the judge's court.<sup>17</sup> Further, the Council analyzes the affirmance rates for trial judges<sup>18</sup> and the number of times the judge is pre-empted from hearing cases.<sup>19</sup> Moreover, the Council examines the judge's timeliness in rendering decisions<sup>20</sup> and, in appropriate cases, the Council interviews the judge standing for retention.<sup>21</sup> Finally, the Council goes to great lengths to publicize all of the information obtained.<sup>22</sup> At the end of this process, the Council votes, in open session, to recommend to the voters either to retain or not to retain the judge.<sup>23</sup>

Following the first retention election for an individual judge, the judge must stand again for retention on a schedule determined by the judge's level of court: every four years for district court,<sup>24</sup> every six years for superior court,<sup>25</sup> every eight years for the court of appeals,<sup>26</sup> and every 10 years for the supreme court.<sup>27</sup>

To summarize, Alaska's merit selection and retention system is a three-part process: First, the Judicial Council nominates two or more judicial candidates on the basis of merit by considering their professional competence, integrity, fairness, temperament, suitability of experience, judgment and common sense, and demonstrated commitment to public service. Next, the governor appoints from the list of those nominated, presumably choosing the appointee who best meets the governor's criteria for judicial excellence. Finally, after two or three years, the voters determine whether the judge will remain on the bench.

## II. WHY THE FOUNDERS ADOPTED A MERIT-BASED SELECTION SYSTEM

When Alaska's Constitutional Convention convened on November 8, 1955, the delegates on the Judiciary Committee enjoyed unique freedom to shape Alaska's judicial system. The Second Organic Act—which

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17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. The Judicial Council "widely publicizes the evaluation process through frequent press releases, personal contacts with radio and television stations, speeches to public groups such as community councils and feature articles in newspapers." *Id.*

23. *Frequently Asked Questions About Retention*, ALASKA JUD. COUNCIL, <http://www.ajc.state.ak.us/retention/faq> (last visited Aug. 28, 2018). The council is not obligated to make recommendations, but it has always done so.

24. ALASKA STAT. § 15.35.100 (2016).

25. ALASKA CONST. art. IV, § 6.

26. ALASKA STAT. § 15.35.053 (2016).

27. ALASKA CONST. art. IV, § 6.

formally organized the Territory of Alaska—did not allow Alaska to create its own territorial courts.<sup>28</sup> Thus, Alaska was, prior to statehood, under the exclusive jurisdiction of the federal courts.<sup>29</sup> With no territorial infrastructure upon which to build Alaska’s judiciary, the Committee members looked to other states’ experiments with judicial systems to guide their drafting of Article IV, drawing upon nearly two centuries of state and federal experience in judicial selection.<sup>30</sup>

The Committee members “did not want to experiment” with new, radical proposals to structure the judiciary in drafting Article IV.<sup>31</sup> The Committee wanted to build upon a system “that had precedent and that worked.”<sup>32</sup> Thus, the Committee examined already-functioning judicial selection systems to strike an appropriate balance between independence from the political branches and accountability to the people.<sup>33</sup> Indeed, delegates to the Constitutional Convention were uniformly concerned that party politics or special interests might pollute Alaska’s judiciary.<sup>34</sup> Though the delegates overwhelmingly supported a system where judges were appointed, rather than elected, a small minority of delegates believed judicial elections were the best way to keep politics off the bench.<sup>35</sup> Moreover, the delegates briefly debated having the governor or other elected representatives initially select the nominees, instead of a

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28. Act of Aug. 24, 1912, ch. 387, 37 Stat. 512.

29. See JOHN S. WHITEHEAD, *COMPLETING THE UNION* 128 (2004) (“The [T]erritory [of Alaska] could not create its own territorial courts. Thus all territorial laws would be adjudicated in the existing federal courts.”).

30. It is worth noting, however, that while Alaska’s judiciary mirrors merit-based selection systems from other states, Alaska was actually the first state to adopt merit selection for all its courts. JED HANDELSMAN SHUGERMAN, *THE PEOPLE’S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* 224 (Harvard Univ. Press 2012).

31. PACC, *supra* note 4, at 588 (statement of G. McLaughlin). While the Judiciary Committee was not formally or legally bound to any particular judicial model, the Alaska Bar Association’s Statehood Committee put forward its case for judicial independence when it called for a convention, citing a merit-based selection system as a model. Thomas B. Stewart, *A Model Judiciary for the 49<sup>th</sup> State*, 42 J. AM. JUDICATURE SOC’Y 52 (1958); SHUGERMAN, *supra* note 30, at 224.

32. SHUGERMAN, *supra* note 30, at 224.

33. See VICTOR FISCHER, *ALASKA’S CONSTITUTIONAL CONVENTION* 113–16 (1975).

34. PACC, *supra* note 4, at 596 (statement of R. Rivers) (“All agree that the first step is to find the right method of selecting judges which will insure a bench free from the influence and control of party politics, individuals or pressure groups.”); PACC, *supra* note 4, at 598 (statement of E. Davis) (“[W]ithout qualification, I believe I could say 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 political pressure, a judiciary that will not be subject to pressure from the executive branch of the government.”).

35. PACC, *supra* note 4, at 597 (statement of E. Davis).

judicial council performing that function.<sup>36</sup> How the delegates navigated this disagreement and arrived at the merit selection process is explored in detail below.

### A. Debates at the Constitutional Convention

How the delegates came to design the merit selection process can be divided into two questions. First, why did the delegates choose appointment over election? And second, why did the delegates task a judicial council with sending a list of candidates to the governor, instead of allowing the governor to initially select the candidates? These questions are answered by the delegates' desire to establish a judiciary "independen[t] from the executive and legislative branches" — a judiciary removed from the tumult and vicissitudes of politics.<sup>37</sup>

#### 1. Appointment Versus Election

The Judiciary Committee first looked to experienced professionals in the legal community when weighing an appointment system against an election system.<sup>38</sup> They quickly agreed to follow principles suggested by the American Bar Association and other professional civic groups, which heavily favored appointment.<sup>39</sup> Moreover, before presenting a draft of the article to the entire Convention for debate, Committee Chairman George McLaughlin sought advice and comment from the Alaska Bar Association, federal district court judges, the U.S. Attorney for the Territory of Alaska, and the United States Commissioner in Alaska.<sup>40</sup> This

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36. See, e.g., *About the Commission on Judicial Appointments*, CAL. CTS. <http://www.courts.ca.gov/5367.htm> (last visited Aug. 28, 2018) (describing California's process for filling a vacancy in either the state supreme court or court of appeals, where justices are appointed by the governor and the Commission on Judicial Appointments possesses the ultimate discretion in confirming those appointments).

37. FISCHER, *supra* note 33, at 113.

38. *Id.* at 269–75. The Committee's makeup—five lawyers and two non-lawyers—may partially explain its determination that the views of experienced professionals in the legal community were entitled to weight. *Id.* At the same time, less than twenty-five percent of the convention delegates (thirteen of fifty-five) were lawyers. *Id.*

39. FISCHER, *supra* note 33, at 113. The American Bar Association and American Judicature Society both formally endorsed in the late 1930s a commission-based appointment system that became the basis for the merit selection system Alaska has today. See Glenn R. Winters, *The Merit Plan for Judicial Selection and Tenure: Its Historical Development*, in *SELECTED READINGS: JUDICIAL SELECTION AND TENURE*, 29, 37 (Glenn R. Winters ed., rev. ed. 1973); see also SHUGERMAN, *supra* note 30 at 202–05 (exploring the historical roots of commission-based appointment systems in the United States).

40. FISCHER, *supra* note 33, at 114.

process led to many endorsements of the appointment system, including one from the Board of Governors of the Alaska Bar Association.<sup>41</sup> Ultimately, Chairman McLaughlin and the rest of the Committee presented to the entire Convention a judiciary article that included a non-partisan plan for selecting judges that would “make judges responsible to the people without subjecting them to the partisan politics or competitive campaigns for election or re-election.”<sup>42</sup>

The proposed judiciary article included a merit-based appointment system first adopted by Missouri in the 1940s.<sup>43</sup> Under the Missouri Plan, judges were initially appointed by the governor, who selected from a list of three nominees recommended by a judicial commission.<sup>44</sup> At the first general election following the judge’s first year on the bench, he or she would face the voters in a retention election.<sup>45</sup> Judges who received affirmative votes in this uncontested retention election of a majority of the votes cast earned a full six-year term in office if a trial judge or a twelve-year term if an appellate judge.<sup>46</sup> While substantially similar to the Missouri Plan, Alaska’s judicial selection system allows more time—at least three years for most judges<sup>47</sup>—between a judge’s initial appointment to the bench and the first retention election.

Delegates at the Convention almost uniformly preferred an appointment system to judicial elections,<sup>48</sup> though there was a small, vocal minority advocating for the latter.<sup>49</sup> Broadly speaking, the delegates preferred appointment because they feared that judicial elections would make the judiciary less independent and would potentially lead judges to decide cases based, at least in part, on political considerations.<sup>50</sup> The

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41. *Id.*

42. *Id.*

43. See Norman Krivosha, *In Celebration of the 50th Anniversary of Merit Selection*, 74 J. AM. JUDICATURE SOC’Y 128, 131 (1990). California in 1934 became the first state to adopt an appointment system that considered input from the state’s community of lawyers and judges. *Id.* But Missouri was the first state to implement a system in which a council or committee of attorneys made the initial selection of judicial candidates. *Id.*; see also Hon. Jay A. Daugherty, *The Missouri Non-Partisan Court Plan: a Dinosaur on the Edge of Extinction or a Survivor in a Changing Socio-Legal Environment?*, 62 MO. L. REV. 315, 319 (1997).

44. Daugherty, *supra* note 43, at 319.

45. *Id.*

46. *Id.*; see also MO. CONST. art. V, § 25(c)(1).

47. For district court judges, the period is at least two years. ALASKA STAT. § 15.35.100 (2016).

48. FISCHER, *supra* note 33, at 115.

49. *Id.* (explaining that Robert McNealy, a delegate from Fairbanks, proposed an amendment to the judiciary article that would have substituted judicial elections for the Missouri Plan).

50. See SHUGERMAN, *supra* note 30, at 224–25 (“Alaskan voters were solidly Democratic [in the 1950s], and, at the time, Eisenhower was president and



delegates to the Convention were concerned that elections would force judges to take into account the political effects of their decisions and modify those decisions accordingly. As McLaughlin put it, judges who were worried about election results would be constantly “peering over [their] shoulders to see if [their] decisions were popular.”<sup>51</sup> Second, the delegates were concerned that litigants might not have their claims adjudicated fairly before an elected judiciary.<sup>52</sup>

These concerns steered the delegates away from judicial elections. But the delegates still desired some degree of popular control over the composition of the bench and believed that “[t]he popular will should be expressed even in the control of the judiciary.”<sup>53</sup> Thus, the Committee ultimately decided that judges’ names should be placed before the people on a nonpartisan ballot “at the first general election held more than three years after his appointment.”<sup>54</sup> This compromise was, in the eyes of Chairman McLaughlin, “the best solution to a vexing problem between those who feel we should have lifetime tenure so the judges can be absolutely independent or whether we should have short terms so the judges could be subject to popular will.”<sup>55</sup>

McLaughlin was not willing, however, to endorse the Missouri Plan’s short period of time between the initial appointment of a judge and the first retention election.<sup>56</sup> Echoing his earlier concern that elected judges may be constantly “looking over their shoulder”<sup>57</sup> to gauge the popularity of their decisions, McLaughlin explained,

the only way we could assure the attraction of good candidates was to assure them they would be in office at least for a period of three and one-half years. Why is that necessary? Because after a year and one-half a judge might make a very unpopular decision, and he would not be able to overcome that in terms of popular resentment, and he might be forced out of office after a year and one-half.<sup>58</sup>

McLaughlin believed that holding retention elections a minimum of three years after appointment would capture the benefits of an

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Republicans controlled the Senate... . Alaskan leaders understood that nonpartisan appointment was a public statement to a national audience and to Republicans that Alaskans intended to govern responsibly with nonpartisanship.”).

51. PACC, *supra* note 4, at 584 (statement of G. McLaughlin).

52. *Id.* at 601 (statement of L. Barr).

53. *Id.* at 586 (statement of G. McLaughlin).

54. ALASKA CONST. art. IV § 6.

55. PACC, *supra* note 4, at 601 (statement of G. McLaughlin).

56. *Id.*

57. *Id.* at 584 (statement of G. McLaughlin).

58. *Id.* at 586.

independent judiciary while still allowing the people to have their say in who gets to be a judge.<sup>59</sup>

Committee members also believed the Missouri Plan would produce the most well-qualified candidates for the bench. Ketchikan delegate Walter Smith, for example, thought that while “political implications would be equal” in either an appointment or elective system, “under an elective system a man is elected on his personal charm or his popularity and quite often his qualifications are not closely examined.”<sup>60</sup> Fairbanks delegate Ralph Rivers echoed Smith’s belief, arguing that elections would turn away otherwise qualified candidates for judgeships because they would hesitate to join the “political circus” of judicial elections.<sup>61</sup> McLaughlin also concurred with Smith and emphasized that the attorneys on the Judicial Council would assure the most-qualified candidates are sent to the governor for final approval.<sup>62</sup>

The appointment system was not without its detractors. Fairbanks delegate and attorney Robert McNealy strongly preferred an election system to appointment. He believed that the latter fomented “much greater political interference and corruption.”<sup>63</sup> McNealy, who had lived in Alaska nearly 20 years at the time of the Convention, expressed his personal frustration with an appointment system, stating that “Being an attorney, I know the background of the appointment system of judges. Being an Alaskan I have lived under the appointment system so long that I feel that I should have the right to vote for these judges.”<sup>64</sup> McNealy’s substantive arguments, however, are somewhat difficult to decipher because he often advocated his positions by articulating long and, at times, confusing hypotheticals rather than stating his arguments directly.<sup>65</sup>

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59. At least one legal scholar has argued that retention elections soon after appointment are undesirable. See Erwin Chemerinsky, *Evaluating Judicial Candidates*, 61 S. CAL. L. REV. 1985, 1989 (1988) (“Another problem that needs to be addressed has to do with the frequency of retention elections in California. Although judges have twelve-year terms in California, they face retention elections in the first general election after their appointment.”).

60. PACC, *supra* note 4, at 589 (statement of W. Smith).

61. *Id.* at 593–94 (statement of R. Rivers).

62. *Id.* at 687 (statement of G. McLaughlin).

63. FISCHER, *supra* note 33, at 115.

64. PACC, *supra* note 4, at 583 (statement of R. McNealy).

65. See discussion *infra* Section II.A.2; see also PACC, *supra* note 4, at 592 (using the fictional “Judge Whoozit” in a hypothetical wherein lawyers in Alaska band together in an attempt to discredit a deficient judge—McNealy was using this hypothetical to claim that the general public would not be swayed by such an attempt because “Judge Whoozit” would be able to convince them that the lawyers were trying to sabotage him).

A careful dissection of McNealy's Convention speeches reveals two principled concerns with merit-selection: (1) Absent a political opponent, judges adept in political communication and self-promotion will always win their retention elections. Thus, even deficient judges will remain on the bench indefinitely. (2) Members of an appointed Judicial Council will be necessarily beholden to the political interests of the body that appointed them.<sup>66</sup> The lay members of the Council will be an arm of the governor, whereas the three attorney members will reflect the wishes of the Alaska Bar Association because "lawyers have politics, too."<sup>67</sup> As an examination of subsequent history reveals, neither argument has proven correct.<sup>68</sup>

McNealy's first argument was premised on the belief that "the general public does not pay too much attention to judges and what is going on in court unless it is your case before the court."<sup>69</sup> He went on to say that if a judge issued poor decisions, then that judge would still win any retention election because the judge would only have to run against his or her record—as opposed to an opponent—and the only people voting against that judge would be legal professionals with the time and education to understand why the judge's decisions were deficient.<sup>70</sup>

This argument is not entirely without theoretical merit. Many scholars—some in Alaska—argue that retention elections encourage a "yes" vote because the judge has the advantage of incumbency and voters do not have an alternative judicial candidate to support.<sup>71</sup> Indeed, acknowledging that the public may have difficulty in assessing a judge's

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66. See PACC, *supra* note 4, at 590–93 (statement of R. McNealy).

67. PACC, *supra* note 4, at 2884 (statement of R. McNealy); see also SHUGERMAN, *supra* note 30, at 226 ("One theory suggests that merit selection was the product of powerful state bar associations, but this theory certainly does not apply to Alaska. The Alaska bar did not even exist in any organized way until the state constitutional convention was announced.").

68. As to the notion that opposition by the organized bar would guarantee that a judge up for retention would win, see *supra* note 65. As to the notion that appointees would always reflect the views of the entity that appointed them, and that 3-3 votes would routinely result, see *infra* note 73.

69. PACC, *supra* note 4, at 591 (statement of R. McNealy).

70. See *id.*

71. See GORDON HARRISON, ALASKA LEGISLATIVE AFFAIRS AGENCY, ALASKA'S CONSTITUTION: A CITIZEN'S GUIDE 98 (5th ed. 2012), available at <https://www.commerce.alaska.gov/web/Portals/4/pub/AK%20CONSTITUTION-Citizens%27%20Guide.pdf>; Chris W. Bonneau, *Electoral Verdicts: Incumbent Defeats in State Supreme Court Elections*, 33 AM. POL. RES. 818 (2005); THOMAS MOREHOUSE AND GERALD MCBEATH, ALASKA POLITICS AND GOVERNMENT 200 (Univ. of Neb. Press 1994) ("The removal of only a handful of judges typically occurs with the kind of retention election Alaska uses. The elections do not present voters with a choice between candidates. If a judge is not retained, the people have little say about the replacement. Foes of a certain judge must be organized and well-funded to mobilize opposition among the electorate.").

performance (and mindful of a judge's vulnerability to last-minute smear campaigns) without readily-accessible evaluative data, the Alaska State Legislature in 1975 directed the Judicial Council to evaluate judges standing for retention elections and publish the results prior to the election.<sup>72</sup> And while several judges have been retained by the voters despite a non-retention recommendation by the Council, all but one judge rejected by the voters after 1975 received a non-retention recommendation from the Council.<sup>73</sup>

McNealy's second argument was that Council members would be mere pawns of the entity that appointed them: lay persons on the Judicial Council appointed by the governor would, according to McNealy, merely be instruments of the governor's political party and lawyers would represent only the Bar.<sup>74</sup> McNealy also suggested that such a deadlock could block formation of the Council itself if agreement on nominees for chief justice could not be reached.<sup>75</sup> Of course, this argument loses its force

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72. ALASKA STAT. § 15.58.050 (2016) (“...the Judicial Council shall file with the lieutenant governor a statement including information about each supreme court justice, court of appeals judge, superior court judge, and district court judge who will be subject to a retention election. The statement shall reflect the evaluation of each justice or judge conducted by the Judicial Council according to law and shall contain a brief statement describing each public reprimand, public censure, or suspension received by the judge. . . .”); HARRISON, *supra* note 71, at 101 (“To evaluate the fitness of judges for retention, the Council surveys attorneys, police officers, probation officers, jurors, social workers, and court employees; it studies decisions of the judge and pertinent court records; and it solicits citizens’ opinions through public hearings and other means. The Council must publicize the results of its evaluations at least 60 days before the retention election. It does so by publishing them in newspapers around the state and in the official election pamphlet distributed to voters by the division of elections.”).

73. See ALASKA JUDICIAL COUNCIL, FREQUENTLY ASKED QUESTIONS, <http://www.ajc.state.ak.us/retention/faq> (last visited Aug. 28, 2018) (“Since 1976, the Judicial Council has recommended against a judge’s retention twelve times.”); see also ALASKA JUD. COUNCIL, 1976-2016 RETENTION VOTE HISTORY (2016), available at <http://www.ajc.state.ak.us/sites/default/files/imported/retention/retvotes16.pdf> (showing two judges were removed in 1982, one in 2006, and one in 2010). As this article was being finalized for publication, Anchorage Superior Court Judge Michael Corey lost his 2018 retention election despite receiving a recommendation from the Judicial Council that he be retained. Michelle Theriault Boots, *Voters Oust Anchorage Judge Targeted for Role in Controversial Plea Agreement*, ANCHORAGE DAILY NEWS (Nov. 6, 2018), <https://www.adn.com/alaska-news/2018/11/06/anchorage-judge-targeted-for-role-in-controversial-plea-agreement-trailing/>. Corey was the target of a grassroots campaign to remove him from the bench after he accepted a controversial plea agreement. *Id.* This was the first time in Alaska’s history that a judge lost his or her retention election after receiving a positive recommendation from the Council, and it was also the first time a judge was voted off the bench in response to public outrage over a specific judicial decision. *Id.*

74. See PACC, *supra* note 4, at 592 (statement of R. McNealy).

75. See *id.* at 592-93.

when considering that, once the first Chief Justice of the Alaska Supreme Court was appointed, the chief would serve as an *ex-officio* member of the Council and be able to provide the tie-breaking vote. Delegate Ralph Rivers pointed out as much during the Convention:

There is the other point that there will only be six until a supreme court justice is appointed and the only chance for a deadlock would be on nominating two or three people for the office of supreme court justice. After that you have your seventh member and there will be no chance of a deadlock. I am willing to trust the integrity and good sense of the six people first appointed to judicial council to be able to agree on two or three nominations for chief justice, and I am willing to trust the governor to take his choice of those two or three names that are presented, so I see no serious problem of a deadlock in order to get the machinery fully implemented.<sup>76</sup>

McNealy was unable to persuade more than a handful of delegates at the Convention to support an election system. After the proposed Judiciary Article's first reading, the modified Missouri Plan passed by a fifty-one to two vote.<sup>77</sup> W.W. Laws was the only delegate to join McNealy's protest.<sup>78</sup> He did so without joining the debate. McNealy again opposed the Article IV proposal in its third reading.<sup>79</sup> His arguments remained largely the same.<sup>80</sup> McNealy saw the lay members and attorneys on the Judicial Council as pawns in a political chess match between the Alaska Bar Association and the governor.<sup>81</sup> And the Chief Justice of the Alaska Supreme Court would be the proverbial queen: if the governor "can control the chief justice and the three laymen, he makes all the appointments; if the bar association can control the chief justice and the three lawyers on this Judicial Council, they are going to make all the appointments."<sup>82</sup> This argument was able to win over a few converts to

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76. PACC, *supra* note 4, at 594 (statement of R. Rivers).

77. PACC, *supra* note 4, at 610 (vote roll call).

78. FISCHER, *supra* note 33, at 115.

79. *Id.*

80. *See id.*; PACC, *supra* note 4, at 2882-84 (statement of R. McNealy).

81. PACC, *supra* note 4, at 2884.

82. PACC, *supra* note 4, at 2884 (statement of R. McNealy).

McNealy's corner, though his fight was ultimately futile.<sup>83</sup> The final Judiciary Article was approved by a vote of forty-seven to six.<sup>84</sup>

## 2. *Appointment by the Judicial Council Versus Political Appointment*

The delegates to Alaska's Constitutional Convention were uniformly skeptical of the governor's role in appointing judges.<sup>85</sup> Chairman McLaughlin pointed to California as a state that suffered from a broken judicial system precisely because the California judicial commission would consider candidates only if they had already been selected by the governor.<sup>86</sup> He stated at the Convention that "there was a tendency [in California] on the part of the governor to always pick men of his own political party . . . [and] just present [the Council] with a long line of Democrats or a long line of Republicans."<sup>87</sup> Thus, McLaughlin was concerned that even if the governor was unable to appoint the individual judges he or she wanted, they could at least ensure that any newly-appointed judge carried the banner of the governor's party.

McNealy was also skeptical of allowing the governor to appoint judges.<sup>88</sup> As mentioned above, McNealy was against *any* appointment system—he preferred elections.<sup>89</sup> He seemed especially concerned, however, about the governor's political motivations in selecting judges.<sup>90</sup> When he realized that, no matter how much he protested, the Council would be a feature of Alaska's judiciary, McNealy admitted that "in my opinion four lawyers should be able to control this judicial council."<sup>91</sup> McNealy, however, did not consider the *ex-officio* membership of the chief

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83. Moreover, the 60-year history of the Council has definitively consigned McNealy's speculation to the dustbin: Of 1,344 Council votes on judicial selection since 1984, when detailed records have been kept, there have been only 73 ties, requiring the chief justice to cast a vote. ALASKA JUDICIAL COUNCIL, DETAILS OF JUDICIAL NOMINATION VOTES 1984-2018 (2018) (on file with authors). Of those 73 ties, the three attorneys and the three non-lawyers were on opposite sides of the vote only 18 times, or 1.3% of the total votes. *Id.* In those cases, the chief justice voted to forward the applicant in question to the governor nine times, and to not forward the applicant nine times. *Id.* Of those 1,344 votes, the Council was unanimous on 876 votes, and unanimous but for one on 235 votes, for a total of 82.6% unanimous or unanimous-but-for-one. *Id.*

84. PACC, *supra* note 4, at 2881–85 (statement of R. McNealy and vote roll call); *see also* FISCHER, *supra* note 33, at 115.

85. *See, e.g.*, PACC, *supra* note 4, at 584 (statement of G. McLaughlin).

86. *Id.*

87. *Id.*

88. *Id.* at 583–84.

89. *Id.*

90. *See id.* at 585–86

91. PACC, *supra* note 4, 2884 (statement of R. McNealy).

justice in his count, explaining that the “chief justice is going to owe his appointment to the governor.”<sup>92</sup>

At least one delegate suggested skipping the governor altogether and having the Council send a list of nominees directly to the senate for approval.<sup>93</sup> Ralph Rivers pointed out that, because the chief justice would preside over any attempt at impeaching the governor, it might be best to “submit the recommendation [from the Council] directly to the senate.”<sup>94</sup> Rivers explained that “there might be a conflict of interests if these supreme court judges were called to sit upon the trial of a man whom they had received their appointment from.”<sup>95</sup>

The Committee “did consider the possibility” that the Council be allowed to send candidates directly to the senate for confirmation.<sup>96</sup> But the Committee ultimately determined—at the “insistence” of either Thomas Harris or Irwin Metcalf, the two non-lawyers on the Committee—that such a system would be “too much of a closed corporation” and thus desired “some participation by the executive.”<sup>97</sup> Moreover, as mentioned above, McLaughlin was hesitant to experiment with novel, untested systems of judicial appointment.<sup>98</sup> He argued that no conflict of interest between the chief justice and the governor had been identified in any state that followed some version of the Missouri Plan.<sup>99</sup> McLaughlin assured Rivers that the Committee had applied the best practices available by examining judicial systems throughout the country and, should problems arise, the people of Alaska “will attempt to solve them.”<sup>100</sup>

### 3. *The Convention Consultants’ Memorandum*

As a final historical note, it is worth mentioning the input from the Convention consultants.<sup>101</sup> While the consultants agreed with the basic

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92. *Id.*

93. *Id.* at 587–88 (statement of R. Rivers).

94. *Id.* at 588 (statement of R. Rivers).

95. *Id.*

96. *Id.* at 588 (statement of G. McLaughlin).

97. *Id.*

98. *Id.* at 588–89 (statement of G. McLaughlin).

99. *Id.*

100. *Id.*

101. A group of consultants—experts and academics in the fields of public administration and political science—assisted the various constitutional committees. FISCHER, *supra* note 33, at 41. Through these consultants, “delegates obtained the advice of the most widely recognized national authorities on state and local government and were able to learn first-hand about the problems that faced those states with older constitutions.” *Id.* Consultants to the Judiciary Committee included John Bebout, the Assistant Director of the National Municipal League; James Kimbraugh Owen, the Director of both the Public

objectives of the proposed judiciary article, they also stated in their memorandum that “[n]o state constitution has ever gone this far in placing one of the three coordinate branches of government beyond the reach of democratic controls.”<sup>102</sup> The consultants suggested revisions that would, in their view, democratize the process and loosen the grasp of the Alaska Bar Association.<sup>103</sup> These revisions included legislative confirmation of attorney members of the Judicial Council and adding a superior court judge and another lay member to the Council.<sup>104</sup>

These suggestions, however, were never debated on the Convention floor.<sup>105</sup> The Convention had an unwritten rule that the views of the consultants would not be cited during debate on the floor.<sup>106</sup> The delegates followed this practice to avoid any public criticism that “outsiders” were writing the Alaska Constitution.<sup>107</sup> If a consultant had a serious concern or disagreement with a committee or Convention action, he or she would typically communicate this concern to the committee chairman or meet privately with individual delegates.<sup>108</sup> The consultants to the Judiciary Committee did, in fact, bring the above-stated concerns to George McLaughlin in the form of a memo.<sup>109</sup> McLaughlin rejected these suggestions, however, and declined to raise them in any of the debates on the Convention floor.<sup>110</sup>

### III. CHALLENGES TO MERIT SELECTION

Attempts to replace merit selection with different, more politicized, systems for selection of judges have periodically been made. For example, even though the Alaska Constitution requires the governor to appoint from the list of two or more nominees sent by the Judicial Council,<sup>111</sup> and even though discussion at the Constitutional Convention made clear that

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Affairs Research Council of Louisiana and the Louisiana State Law Institute’s Constitutional Revision Project; and Emil J. Sady, the Resident Consultant of the Alaska Constitutional Convention and Senior Board Member of the Government Studies Division at the Brookings Institute. *Id.*

102. FISCHER, *supra* note 33, at 116.

103. *Id.*

104. *Id.*

105. *Id.* at 42.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. ALASKA CONST., art. IV, § 5 (“The governor *shall* fill any vacancy . . . by appointing one of two or more persons nominated by the Judicial Council.” (emphasis added)).



the governor “has no other choice,”<sup>112</sup> governors have at times threatened not to appoint from the list of those nominated by the Judicial Council, variously requesting or demanding more names, in effect attempting to bypass the first, merit-based, stage of the process.<sup>113</sup> No such efforts have been successful.

More seriously, litigants have challenged merit selection as violating the U.S. Constitution and state legislators have attempted to amend the Alaska Constitution to seriously weaken merit selection. To date, neither judicial nor legislative attacks have succeeded. But both lines of attack deserve careful consideration because of their potential to do real harm to the concept of merit selection.

### A. Litigation-based Challenges to Article IV

In 2009, James Bopp, Jr., who would later be recognized as the architect of *Citizens United v. Federal Election Commission*,<sup>114</sup> sued to invalidate Article IV on federal equal protection grounds.<sup>115</sup> In *Miller v. Carpeneti*,<sup>116</sup> the plaintiffs argued that Article IV’s reliance on attorney-

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112. See PACC, *supra* note 4, at 585 *Id.* (Statement of G. McLaughlin). As Chairman McLaughlin stated: “The governor is presented with two names, two or more names. . . . The governor has no other choice, of the two names presented, he takes one, fills the vacancy in the court.” (Statement of G. McLaughlin).

113. In probably the most serious case, Gov. Frank Murkowski in 2004 wrote to the Judicial Council rejecting all nominees for a vacant superior court position in Anchorage. Letter from Frank Murkowski, Governor of Alaska, to Larry Cohn, Exec. Dir., Alaska Judicial Council (Aug. 26, 2004) (on file with the Alaska Judicial Council) (“After careful consideration I have decided to reject the three candidates you have proposed.”); Sheila Toomey, *Governor Nixes Judge Candidates*, ANCHORAGE DAILY NEWS, Aug. 31, 2004, at A1; see also Sheila Toomey, *Rejection of Judge List Is “No Crisis”*, ANCHORAGE DAILY NEWS, Sept. 3, 2004, at B1; Sheila Toomey, *Judicial Council Given Ultimatum Over Bylaws*, ANCHORAGE DAILY NEWS, Sept. 4, 2004, at A1; Anchorage Daily News Staff, *Murkowski Overreaches*, ANCHORAGE DAILY NEWS, Sept. 5, 2004, at H2; Kevin Clarkson, *Truth Lies in Middle on Judge Selection*, ANCHORAGE DAILY NEWS, Sept. 15, 2004, at B6; and following a meeting between the members of the Judicial Council and the governor’s chief of staff, the governor retreated from his original letter rejecting all nominees and appointed one of the nominees sent by the Council. Nicole Tsong, *Judgeship Appointment Issue Still Alive in Court*, ANCHORAGE DAILY NEWS, Jan. 29, 2005, at B2.

114. Bopp’s role in *Citizens United* has been chronicled widely in the press. See, e.g., Sarah Childress, *James Bopp: What Citizens United Means for Campaign Finance*, Frontline (Oct. 12, 2012), <https://www.pbs.org/wgbh/frontline/article/james-bopp-what-citizens-united-means-for-campaign-finance/> (referring to Bopp as “the intellectual architect behind *Citizens United*”).

115. *Miller v. Carpeneti*, No. 3:09-CV-00136-JWS, 2009 WL 10695976, at \*1 (D. Alaska Sept. 15, 2009).

116. *Id.*

members of the Judicial Council violated the Equal Protection Clause of the U.S. Constitution because non-attorneys were denied the right to vote in the selection process for judges.<sup>117</sup>

Relying on United States Supreme Court cases establishing the “one person, one vote” principle, and lower court decisions applying the principle to state and municipal elections, plaintiffs argued that the Alaska judicial selection process violated equal protection because of differences in the ways the participants in the process were themselves selected.<sup>118</sup> That is, while the governor who appointed judges went before all the voters,<sup>119</sup> and the legislators who confirmed the non-attorney members of the Judicial Council went before all the voters,<sup>120</sup> and even the chief justice went before all the voters in his or her retention election,<sup>121</sup> the attorney members of the Judicial Council obtained their positions through appointment by the Bar Association’s board of governors, themselves elected only by members of the Bar Association and not by all Alaska voters.<sup>122</sup>

Defendants moved to dismiss the complaint for failure to state a cause of action, arguing that plaintiffs’ cases (and thus their theory) were inapposite primarily because Alaska’s constitutional scheme for judicial selection did not involve an election: “[P]laintiffs now contend that the constitutional selection process denies non-attorneys an equal right to vote for judges. Plaintiffs’ claim fails principally because there is no election to select Alaska’s judges.”<sup>123</sup> Defendants also argued that even if the merit selection process were elective in nature, one person, one vote does not apply to the judicial branch because judges do not represent the people.<sup>124</sup> Alternatively, defendants argued that election to the Board of Governors fell within the limited purpose election exception to the one person, one vote rule.<sup>125</sup>

The federal district court agreed with the defendants and granted the motion to dismiss.<sup>126</sup> It began with the observation that “[o]f course, Alaska judges are not selected in an election. This forces plaintiffs to contend [one person, one vote] applies even where the state has chosen to

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117. *Id.* at \*7-9.

118. *Id.* at \*8.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. Defendants’ Memorandum in Support of Motion To Dismiss at 2, *Miller v. Carpeneti*, No. 3:09-cv-00136-JWS, 2009 WL 10695976 (D. Alaska Sept. 15, 2009).

124. *Id.* at \*11.

125. *Id.* at \*19.

126. See *Miller v. Carpeneti*, No. 3:09-CV-00136-JWS, 2009 WL 10695976 (D. Alaska Sept. 15, 2009).

select judges by appointment.”<sup>127</sup> For this reason, the one person, one vote principle did not directly apply.

The district court also rejected plaintiffs’ claim on the separate ground that one person, one vote did not apply to the election of the members of the Board of Governors “because the Board’s activities generally fall within the limited purpose exception.”<sup>128</sup> It reached this conclusion because the Board exercised only narrow, limited governmental powers and it conducted activities that disproportionately affected only a specific group of individuals—here, lawyers.<sup>129</sup> Because the Board was a limited purpose entity, the franchise could be constitutionally limited to lawyers, a group of individuals who are disproportionately affected, so long as the decision is reasonable and bears a rational relationship to a legitimate state interest. The court concluded that “[t]he Plan reflects the entirely rational proposition [that] lawyers have the experience and expertise needed to select Council members from among the ranks of Alaska’s lawyers. Furthermore, the interest in selecting qualified persons to serve on the Board is a legitimate—indeed very important—interest.”<sup>130</sup> For these reasons the district court concluded that the election of lawyers to the Board of Governors passed constitutional muster.<sup>131</sup>

Finally, the court reviewed whether the Board’s selection of the attorney members of the Judicial Council violated equal protection. It did not, the court held, because one person, one vote “does not apply where non-legislative officers are chosen by appointment, rather than by election.”<sup>132</sup> Moreover, even if that principle applied, the Council itself is a limited purpose entity and it qualifies for the limited purpose exception to the one person, one vote principle.<sup>133</sup>

Plaintiffs appealed the decision of the district court to the Ninth Circuit.<sup>134</sup> That court affirmed in a unanimous decision which began by noting that “the district court correctly concluded [that] the right to equal voting participation has no application to the Judicial Council because the

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127. *Id.* at \*1.

128. *Id.* at \*19. The limited purpose entity exception is based on the Supreme Court’s determination that the one person, one vote principle does not apply to the election of an entity that (1) exercises only limited governmental powers and (2) conducts activities that disproportionately affect only a specific group of individuals. *E.g.*, *Ball v. James*, 451 U.S. 355, 364 (1981).

129. *Miller*, 2009 WL 10695976, at \*19.

130. *Id.* at \*20.

131. *Id.* at \*20–21.

132. *Id.* at \*21.

133. *Id.* at \*22.

134. *Kirk v. Carpeneti*, 623 F.3d 889, 891 (9th Cir. 2010).

members of the Council are appointed, rather than elected.”<sup>135</sup> The court then directly addressed plaintiffs’ “novel argument that all participants in Alaska’s judicial selection process must either be elected themselves, or be appointed by a popularly elected official.”<sup>136</sup> Noting that plaintiffs’ sole support for that proposition was “thin,” the court nonetheless proceeded to address it comprehensively.<sup>137</sup>

Plaintiffs relied on a footnote in *Kramer v. Union Free School Dist. No. 15*,<sup>138</sup> in which a New York resident challenged a statute that limited voting in certain school board elections to property owners, leaseholders, and parents with children enrolled in the public schools. The Court struck down the statute in *Kramer*, applying strict scrutiny, because its restrictions impermissibly denied citizens with a legitimate interest in school affairs the right to vote in school board elections.<sup>139</sup> In its analysis, the Court noted the difference between elective and appointive systems.<sup>140</sup> In the latter, the Court stated that a voter had “indirect” influence over an appointment by virtue of voting for the appointing official: “Each resident’s formal influence is perhaps indirect, but it is equal to that of other residents.”<sup>141</sup> But in an elective system, there was no influence exercised by those voters who were disqualified from voting.<sup>142</sup>

Plaintiffs used the quoted footnote to argue that the appointment power must be limited to officials who have been elected.<sup>143</sup> The Ninth Circuit directly rejected that theory:

Plaintiffs attempt to characterize *Kramer*, and particularly the footnote 7 sentence referring to equal indirect influence in appointments, as holding that the Equal Protection Clause requires limiting the appointment power to officials who have been popularly elected. . . . The *Kramer* footnote does not stand for any such proposition. . . . The Court did not suggest a sweeping new constitutional rule that appointments for all positions in every branch of government must be made by an official who is popularly elected.<sup>144</sup>

The court went on to note that fourteen states besides Alaska “give a significant role to attorneys in the merit selection process,” using

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135. *Id.* at 898.

136. *Id.*

137. *Id.*

138. 395 U.S. 621 (1969).

139. *Id.* at 630–32.

140. *Id.* at 627 n.7.

141. *Id.*

142. *Id.*

143. *Kirk*, 623 F.3d at 907.

144. *Id.* at 899.

nominating commissions that include attorney members who are neither popularly elected nor appointed by a popularly-elected official.<sup>145</sup> And it pointed out that federal magistrate judges and federal bankruptcy judges are appointed after nomination by merit selection panels that are not popularly elected.<sup>146</sup>

Having decided that the district court had properly resolved the constitutional issues raised by the case, the Ninth Circuit concluded its discussion with the observation that the pros and cons of the merit selection of judges, and the pros and cons of giving attorneys a role in that system, were discussed at the Alaska Constitutional Convention, and that the debate continues to this day.<sup>147</sup> The court noted, “[t]he legal principle Plaintiffs ask the courts to establish is in fact a change in policy that requires amendment to the Alaska Constitution. To date, there is no indication of any desire on the part of Plaintiffs to invoke the amendment process.”<sup>148</sup> That would soon change.

## **B. Attempts to Amend Article IV**

In the 28<sup>th</sup> Alaska State Legislature, following the Ninth Circuit’s definitive rejection of plaintiffs’ attack on Article IV of the Alaska Constitution, and its observation that plaintiffs’ sole avenue for the change they sought was in the amendment process, Alaska State Senator Pete Kelly introduced Senate Joint Resolution 21 (SJR 21).<sup>149</sup> SJR 21 sought to amend Article IV of the Alaska Constitution to accomplish the broad objectives of the earlier-failed litigation.<sup>150</sup>

SJR 21 initially proposed a single change to Article IV that would dramatically alter the balance achieved by the founders. The even ratio (3:3) between non-attorneys and attorneys specified by the Constitution would be changed so that there would be twice as many non-attorneys as attorneys: the governor would appoint ten non-attorneys to the Judicial Council while the Board of Governors of the Alaska Bar Association would appoint five attorneys.<sup>151</sup> SJR 21 was later amended so that the

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145. *Id.* at 900.

146. *Id.*

147. *Id.*

148. *Id.* at 891.

149. S.J. Res. 21, 28th Leg., 2d Sess. (Alaska 2014).

150. The litigation sought to remove entirely the role of attorneys on the Judicial Council by disqualifying them from membership on the Council. *Kirk v. Carpeneti*, 623 F.3d 889, 891 (9th Cir. 2010). The proposed amendment, by comparison, sought to diminish substantially the attorneys’ role on the Council – and concomitantly expand the governor’s power – by providing a much greater number of non-attorneys on the Council.

151. S.J. Res. 21, 28th Leg., 2d Sess. (Alaska 2014).

number of attorneys would remain at three and the non-attorney members would increase from three to six.<sup>152</sup> A second change was also proposed, prohibiting the attorney members of the Council from taking their seats until confirmed by the legislature.<sup>153</sup>

SJR 21 was the subject of intense legislative debate. Proponents generally attacked what they claimed was the undue power exercised by attorneys in the selection process—some suggested that the lawyers could “dictate” who would go to the governor—pointing primarily to the fact that the three attorney members of the Council, plus the chief justice, constituted a “controlling majority” of the Council.<sup>154</sup> And a recurrent theme was that the attorneys and chief combined to limit the number of names being sent to the governor.<sup>155</sup> Opponents of the measure, however, provided testimony at several committee hearings, strongly rebutting the claim that attorneys exercised undue influence in the process,<sup>156</sup> but were

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152. Comm. Substitute for S.J. Res. 21 (FIN), 28th Leg., 2d Sess. (Alaska 2014).

153. Comm. Substitute for S.J. Res. 21 (2d FIN), 28th Leg., 2d Sess. (Alaska 2014).

154. *A Resolution Proposing Amendments to the Constitution of the State of Alaska to Increase the Number of Members on the Judicial Council and Relating to the Initial Terms of New Members Appointed to the Judicial Council: Hearing on S.J. Res. 21 Before the S. Judiciary Comm.*, 28th Alaska Leg., 2d Sess. (Alaska 2014) (Statement of Sen. Kelly, Sponsor, at 1:58:44–2:00:30; Statement of William Clarke at 2:42:34).

155. *Id.* (Statement of Sen. Kelly, at 1:59:00).

156. Opponents presented the 2014 version of the chart adverted to in note 83, above. Nancy Meade, General Counsel of the Alaska Court System, introduced a chart entitled “Alaska Judicial Council, Voting Statistics—Applications for Judicial Positions.” *A Resolution Proposing Amendments to the Constitution of the State of Alaska to Increase the Number of Members on the Judicial Council and Relating to the Initial Terms of New Members Appointed to the Judicial Council: Hearing on S.J. Res. 21 Before the S. Judiciary Comm.*, 28th Alaska Leg., 2d Sess. (Alaska 2014) (Statement of Nancy Meade, General Counsel, Alaska Court System, at 2:15:08).

The situation regarding voting patterns in the Judicial Council has not changed in any material way since the legislative debates surrounding SJR 21 in 2014. In 2014, as now, over 60% of Council votes are unanimous and over 80% are unanimous or unanimous except for one. ALASKA JUD. COUNCIL, DETAILS OF JUDICIAL NOMINATION VOTES 1984-2018 (Sept. 2, 2018) (on file with authors). Only 1.3% of the votes are ties with all the attorneys on one side and the non-attorneys on the other. *Id.* In breaking those ties, the chief voted to send the applicant’s name to the governor nine times, and nine times not to send it on. *Id.* And in response to the repeated claim that the attorneys, including the chief justice, worked to limit the number of nominees sent to the governor, the opponents showed that, when the lawyers and non-lawyers were evenly split, the chief justice broke ties in favor of nominees exactly half of the time (in 9 of 18 cases). *Id.* And in the cases of all tie votes (that is, including instances where attorneys and non-attorneys were on both sides of the vote), the chief justice voted to send the name of the applicant to the governor 75% of the time. *A Resolution Proposing Amendments to the Constitution of the State of Alaska to Increase the Number of Members on the Judicial Council and Relating to the Initial Terms of New Members Appointed to the Judicial Council: Hearing on S.J. Res. 21 Before the S. Judiciary Comm.*, 28th Alaska Leg., 2d Sess. (Alaska 2014) (Statement of Susanne diPietro at 2:17:42).

unsuccessful in stopping its advance through all committees of referral. But the really significant debates were largely within the membership of the Republican majority that controlled the Senate, and out of the public process. While successfully navigating all committees of referral,<sup>157</sup> the resolution was eventually withdrawn by its sponsor before floor debate in the Senate,<sup>158</sup> signaling that the resolution lacked sufficient support within the party to pass the full legislature.<sup>159</sup>

The sponsors of SJR 21 introduced a virtually identical measure, Senate Joint Resolution 3 (SJR 3), in the following Alaska State Legislature.<sup>160</sup> By this time, however, defenders of Article IV and the merit selection system had organized,<sup>161</sup> and successfully stopped SJR 3 in committee.<sup>162</sup> The proponents did not re-introduce any similar measures in the 30th Alaska Legislature.

#### IV. EVALUATING MERIT-BASED SELECTION

##### A. The Challenge of Judicial Evaluation

It is difficult to quantify the practical benefits of a merit-based selection system. Evaluating different systems of judicial selection necessarily involves making a broader assessment about the role of the judicial branch in American government.<sup>163</sup> Some commentators believe that judicial elections are desirable because they satisfy the demands of popular sovereignty,<sup>164</sup> even if those elections produce judges who are

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157. S.J. Res. 21, *Bill History, 28th Legislature, 2013/2014*, available at [www.akleg.gov](http://www.akleg.gov) (last visited Aug. 26, 2018) (passed Sen. Jud. Comm. 2/28/14; passed Sen. Fin. Comm. 3/31/14; advanced to third reading 4/4/14).

158. S. JOURNAL, 28th Leg., 2d Sess., at 2431 (Alaska 2014).

159. Dermot Cole, Fischer, Carpeneti Defend Judge Selection System at State Bar Convention, ALASKA DISPATCHNEWS (May 13, 2015), <https://www.adn.com/politics/article/fischer-carpeneti-discuss-judge-selection-state-bar-convention/2015/05/14/> (“Kelly introduced [SJR 21] in 2014, but could not line up 14 votes in the senate to advance the plan, as Fairbanks Republican Sen. Click Bishop opposed it at a key moment.”).

160. S.J. Res. 3, 29th Leg., 1st Sess. (Alaska 2015).

161. The opponents of SJR 21 later created a non-profit group called Justice Not Politics Alaska to defend Art. IV and the merit selection system. ABOUT US, JUSTICE NOT POLITICS ALASKA, <http://justicenotpoliticsalaska.org/pages/about-us/> (last visited Oct. 7, 2018).

162. See S. JOURNAL, 29th Leg., 1st Sess., at 584 (Alaska 2015) (representing the last recorded action regarding the resolution, which was referral to the senate judiciary committee).

163. Laura Denvir Stith & Jeremy Root, *The Missouri Nonpartisan Court Plan: The Least Political Method of Selecting High Quality Judges*, 74 MO. L. REV. 711, 712 (2009).

164. See, e.g., Federalist Society Judicial Elections White Paper Task Force, *The Case for Partisan Judicial Elections*, 33 U. TOL. L. REV. 393, 394 (2002)

evaluated as less competent than appointed judges.<sup>165</sup> Others argue that an independent judiciary—one without elections—is justified by reference to both the principles of American democracy and the demonstrable harms of electing judges.<sup>166</sup> As to the former principle, an independent judiciary more closely aligns with the separation of powers fundamental to American constitutionalism.<sup>167</sup> As Alexander Hamilton wrote in the Federalist No. 78, “the complete independence of the courts is peculiarly essential” in American governance.<sup>168</sup> On a practical level, scholars have pointed out that popular control of the judiciary may compromise constitutional rights,<sup>169</sup> lead to harsher sentences for criminal

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(“[J]udicial elections have substantial advantages over the alternatives not least in that they provide an additional, significant measure of self-government to voters.”); Ray M. Harding, *The Case for Partisan Election of Judges*, 55 A.B.A. J. 1162, 1164 (1969) (“Query: Is it not our political system of elective representation that guarantees popular sovereignty? We have a tripartite system of government, the judiciary being but one branch of a system designed to insure that all branches of government will be responsible to the will of the governed.”).

165. See generally Stephen Choi et al., *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 26 J. L., ECON. & ORG. 290, 308, 316 (2010) (pointing out that, when compared to elected judges, appointed judges are cited more often in other jurisdictions and are typically older and have more legal experience when they assume the bench).

166. See, e.g., Erwin Chemerinsky, *Evaluating Judicial Candidates*, 61 S. CAL. L. REV. 1985 (1988).

167. See *id.* at 1988 (“The paramount function of courts is to protect social minorities and individual rights. But judges cannot be expected to perform this countermajoritarian function if their ability to keep their prestigious, highly sought after positions depends on popular approval of their ruling. . . . Thus, I strongly favor abolition of judicial elections in all states.”); see also Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 726 (1995) (“[E]lective judiciaries pose two problems for the constitutional democrat. First, the rights of individuals and unpopular minority groups may be compromised by an elective judiciary. Second, and more mundane but no less important, the impartial administration of “day-to-day” justice may be compromised.”).

168. THE FEDERALIST No. 78 (Alexander Hamilton).

169. See Croley, *supra* note 167, at 727 (“Insofar as the outcomes of judicial elections are dependent on majoritarian attitudes concerning individual or minority constitutional rights, these rights may be compromised.”); see also Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1580 (1990) (“The independence demanded [of the judiciary] must insulate the courts from the people as well as the legislature.”).



defendants,<sup>170</sup> and allow moneyed interests to infect the judicial arena.<sup>171</sup>

Assessing merit-based judiciaries is further complicated in two ways. First, comparative studies of judicial selection methods usually rely on data collected from different states – where slight variations may exist between nominating systems despite their common denomination as “merit-based” – and each study uses a different method of data collection and analysis.<sup>172</sup> Second, there are many different ways to evaluate judicial selection and retention using a variety of metrics, and each has its strong supporters.<sup>173</sup>

With these considerations in mind, the success of Alaska’s merit-based system can be assessed through quantitative studies that examine judicial selection, the historical presence or absence of corruption in state judicial systems, and qualitative assessments of Alaska’s judiciary by legal scholars and commentators.

## B. Studies on Merit-Based Selection

Robust studies examining merit-based selection are few and far between.<sup>174</sup> Two scholars at the University of Alaska Anchorage’s Justice

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170. See, e.g., KATE BERRY, BRENNAN CTR. FOR JUST., *HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES* 13 (2015); see also Stephen Bright & Patrick Keenan, *Judges and the Politics of Death: Deciding between the Bill of Rights and the Next Election in Capital Cases*, 1995 B.U. L. REV. 793–95 (1995) (observing that judges who face retention elections are more likely to override jury sentences to impose death); Fred Burnside, Comment, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 WIS. L. REV. 1017, 1020 (1999) (examining political incentives leading judges to override jury sentences).

171. Chemerinsky, *supra* note 166, at 1988 (“[P]ublic disclosure of campaign contributions means that judges can know who donated both money for and against them. There will be the inevitable suspicion that certain judicial votes were influenced by the dollars spent in the election campaign.”).

172. Rebecca Mae Salokar et al., *The New Politics of Judicial Selection in Florida: Merit Selection Redefined*, 27 JUST. SYS. J. 123, 124 (2006); see also Ryan Fortson & Kristin S. Knudsen, *A Survey of Studies on Judicial Selection*, ALASKA JUST. FORUM, Summer/Fall 2015 at 1, 9 (“[E]ach state handles its judicial selection differently. This underscores the need to compare the different selection methods.”).

173. See generally Erwin Chemerinsky, *Ideology, Judicial Selection and Judicial Ethics*, 2 GEO. J. LEGAL ETHICS 643 (1989) (describing different methods of evaluating judges); see also Fortson & Knudsen, *supra* note 172.

174. G. Alan Tarr, *Commission-Based Judicial Appointment: The American Experience*, 41 REVUE GENERALE DE DROIT 239, 263 (2011) (pointing out that both critics and proponents of merit-based selection have failed to develop a modern, comprehensive set of empirical research); see also Antonia Moras, *A Look at Judicial Selection in Alaska*, ALASKA JUST. F., Fall 2004, at 9, 11 (“Beyond the [Alaska Judicial] Council’s own research, little evaluation of the Alaska selection and retention processes has been done, and there seems to be a need for additional formal examination of their patterns and history to see how the framework has held up over the last four and a half decades.”); cf. Fortson & Knudsen, *supra* note 172, at 10 (“There have been few empirical studies of selection method effects on trial

Center, Ryan Fortson and Kristin Knudsen, published a survey of studies on judicial selection in response to the Alaska legislature's consideration of SJR 3 in 2015.<sup>175</sup> These studies, according to the Justice Center, "are illustrative of the variety of approaches taken to evaluate the impact of selection methods on the quality of judicial performance."<sup>176</sup> Taken together, these studies highlight several desirable features of Alaska's merit-based judicial selection process, as well as the potential dangers of modifying it.<sup>177</sup>

Fortson & Knudsen first point to a study conducted by Salokar, et al.,<sup>178</sup> which examined the effects of a 2001 Florida state law that gave the governor "substantially greater power in appointing members of [Florida's] judicial nominating commissions"<sup>179</sup> and "reduce[d] the influence of the state bar association."<sup>180</sup> The Salokar study is particularly probative for two reasons. First, the study examined both the composition of Florida's judicial nomination commissions *and* the political orientation of individuals applying for and appointed to judgeships, rather than looking at just one or the other.<sup>181</sup> Second, the Salokar study looked at these data before and after a change in Florida's judicial selection system that was similar to the proposed Alaska constitutional amendment.<sup>182</sup>

Florida has multiple judicial nomination commissions – one for each circuit and appellate court – resulting in twenty-six total commissions.<sup>183</sup> Before 2001, three commissioners had to be lawyers appointed by the Florida Bar Association; three commissioners were appointed by the governor (and could be lawyers or non-lawyers); and the remaining three commissioners had to be non-lawyers and were selected by the six other commissioners.<sup>184</sup> Florida voters approved changing this system in 2001 so that the governor appoints four members from a list of names submitted by the Florida Bar Association but can reject the list and ask for

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judges.").

175. See generally Fortson & Knudsen, *supra* note 172.

176. *Id.* at 1.

177. Fortson & Knudsen took no position on the desirability of Alaska's merit-based judicial selection process. They provided a number of studies but did not advocate for any particular judicial selection process. Thus, any advocacy that makes reference to Fortson & Knudsen comes from the authors of this article.

178. Salokar et al., *supra* note 172.

179. Fortson & Knudsen, *supra* note 172, at 7.

180. Salokar et al., *supra* note 172, at 123–24.

181. *Id.* at 128, 130.

182. *Id.* at 124.

183. *Id.* at 125.

184. *Id.* at 124–25.

a new one.<sup>185</sup> The other five members are appointed entirely at the discretion of the governor, though at least two must be lawyers.<sup>186</sup>

This change, according to Salokar, shifted Florida's judicial selection process "away from the collaborative bar-governor process, which has been the hallmark of merit selection, to a system closer to a gubernatorial appointment process."<sup>187</sup> After 2001, both the commissions themselves, as well as the judges ultimately appointed to the bench, aligned more closely with the political party of the governor (Republican at the time).<sup>188</sup> The commissioners selected under Florida's new system are "overwhelmingly" Republican, accounting for 86.9 percent of overall appointees.<sup>189</sup> This political alignment was true both of the applicants for the governor-appointed commission positions and of applicants recommended by the Florida Bar.<sup>190</sup> Those appointed by the governor were nearly entirely Republican (98.2%) and none were Democrats.<sup>191</sup>

Party affiliation bias also carried over to the judges selected.<sup>192</sup> The number of judges registered as Republican increased from 61 percent to 77 percent. Moreover, judicial applicants increasingly listed in their application prominent Republican politicians as personal references<sup>193</sup> and openly advertised their affiliation with Christian Right social organizations.<sup>194</sup>

Salokar's study demonstrates that giving more power in the judicial selection process to politically elected leaders results in an increasingly politicized judiciary.<sup>195</sup> As Fortson and Knudsen put it, "[i]f a hand-picked screening committee assists the governor, it is reasonable to conclude that it will select nominees first for compatibility with the administration's political, ideological, and religious views, then will narrow the pool based on merit and experience."<sup>196</sup>

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185. *Id.*

186. *Id.* at 126.

187. *Id.*

188. *Id.* at 128.

189. *Id.* at 129.

190. *Id.*

191. *Id.*

192. *Id.* at 134 ("The transformation was even more striking on the appellate courts. Before the reforms, only 54.5 percent of the governor's eleven appointments to the district courts of appeals were Republicans, but following the reform, all nine (100 percent) were registered Republicans.").

193. *Id.*

194. *Id.* at 138. Alaskan commentators expressed concern that modifying the Alaska Judicial Council to give the governor greater control over its composition would similarly inject religiosity into the bench. *See, e.g.,* Barbara McDaniel, *Secular Arguments to Change Judicial Council Mask Religious Agenda*, ALASKA DISPATCH NEWS (Feb. 25, 2016).

195. *Id.* at 138-39.

196. Forston & Knudsen, *supra* note 172, at 9.

Beyond the Salokar study, there is very little research that analyzes changes in the composition of the judiciary in response to greater gubernatorial control over nominating commissions.<sup>197</sup> Other papers analyzing judicial selection largely focus on the broader comparison of judicial election versus appointment.<sup>198</sup> Nevertheless, studies that highlight the differences between election and appointment are helpful when evaluating Alaska's merit-based system as they serve as proxies for comparing more- and less-independent judicial systems.

Studies comparing appointment and election systems indicate that both citizens<sup>199</sup> and corporate litigants<sup>200</sup> report high satisfaction in jurisdictions that have appointment systems. Voter satisfaction with judges may be reflected in the vote in judicial retention elections.<sup>201</sup> In the 2016 retention elections—the most recent for which full statistics are available at the time this article was written—33 judges were up for retention.<sup>202</sup> Alaska voters retained all 33, with the percent voting to retain ranging between 57.5 percent and 75 percent.<sup>203</sup> At least one commentator has observed that “the vote in favor of retention [in Alaska] is typically between 60 and 75 percent of the total. This is evidence of the generally high caliber of Alaska's judges.”<sup>204</sup> Moreover, Alaska's experience with retention elections is consistent with retention elections from other states. A 2007 study of retention elections in ten states showed the mean percentage of affirmative votes for retention consistently in the high 60s to mid-70s.<sup>205</sup>

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197. See *supra* note 174 and accompanying text.

198. See, e.g., Mattias Iaryczower, Garrett Lewis & Matthew Shum, *To Elect or Appoint? Bias, Information, and Responsiveness of Bureaucrats and Politicians*, J. PUB. ECON. 230 (2013).

199. See HARRISON, *supra* note 71, at 98. (observing high affirmative vote percentages in Alaska's judicial retention elections).

200. UNITED STATES CHAMBER OF COMMERCE, INST. FOR LEGAL REFORM, RANKING THE STATES: A SURVEY OF THE FAIRNESS AND REASONABLENESS OF STATE LIABILITY SYSTEMS 20–21 (2017), <https://www.instituteforlegalreform.com/uploads/pdfs/Harris-2017-Executive-Summary-FINAL.pdf> (ranking Alaska's trial judges second in impartiality and fourteenth in competence according to a survey of corporate lawyers and executives).

201. See Fortson & Knudsen, *supra* note 172, at 9 (“One possible measure of the success of the judicial selection process is through voter satisfaction with judges as reflected in the vote in judicial retention elections.”).

202. ALASKA JUD. COUNCIL, 1976-2016 RETENTION VOTE HISTORY (2016), available at <http://www.ajc.state.ak.us/sites/default/files/imported/retention/retvotes16.pdf>.

203. *Id.*

204. HARRISON, *supra* note 71, at 98.

205. See Larry Aspin, *Judicial Retention Election Trends 1964-2006*, JUDICATURE, March–April 2007, at 208, 208–13; cf. Albert J. Klumpp, *Alaska's Judicial Retention Elections: A Comparative Analysis*, 34 ALASKA L. REV. 143, 152 (2017) (noting that Alaska's retention levels are historically lower than other retention states).

Measures of performance other than voter approval also highlight potential advantages of appointment systems. For example, judges in appointment systems are more-often cited by other courts and law reviews,<sup>206</sup> suggesting that appointed judges author more persuasive opinions. And appointed judges are disciplined by judicial disciplinary councils less often than are elected judges,<sup>207</sup> suggesting that appointed judges more closely adhere to norms of professional conduct while serving on the bench.

### C. Assessment of Merit Selection/Retention of Judges

One way to assess the merit system for selection and retention of judges is to assess the functioning of the judicial system itself. If the system functions well, the system for selecting judges can be said to be a good one. While there are certainly other actors besides judges who affect the overall functioning of the judicial system, responsibility in Alaska for its performance rests primarily with judicial officers, as administrative direction of the Alaska Court System is vested in the chief justice.<sup>208</sup> Moreover, appointment of the administrative director to supervise the administrative operations of the judicial system, who serves at the pleasure of the chief justice, is done only with the approval of the Alaska Supreme Court.<sup>209</sup> Beyond these administrative responsibilities, of course, it is judges, at all levels, who make the decisions upon which the judgment of the effectiveness of the judicial system largely depends.

We conclude that the Alaska judicial system has functioned extremely well during its 60-year history. We reach this conclusion based on two complementary analyses. First, the absence of historical evidence of corruption or malfeasance in the history of the Alaska judiciary. Second, the judgments of several legal professionals from across a broad spectrum who have come to regard the Alaska judiciary as a national leader.

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206. See Choi et al., *supra* note 165, at 315 (“Our results are largely consistent with the hypothesis that judges subject to less partisan pressure write higher quality – more frequently cited – opinions.”).

207. MALIA REDICK, AM. JUDICATURE SOC’Y, JUDGING THE QUALITY OF JUDICIAL SELECTION METHODS: MERIT SELECTION, ELECTIONS, AND JUDICIAL DISCIPLINE 5–6 (2010), available at [http://www.judicialselection.us/uploads/documents/Judging\\_the\\_Quality\\_of\\_Judicial\\_Sel\\_8EF0DC3806ED8.pdf](http://www.judicialselection.us/uploads/documents/Judging_the_Quality_of_Judicial_Sel_8EF0DC3806ED8.pdf).

208. ALASKA CONST. art. IV, § 16.

209. *Id.*

### 1. *Absence of Corruption*

In contrast to the unhappy experiences of many other states,<sup>210</sup> the Alaska judiciary has, during its 60-year history, avoided corruption and scandal. A review of Alaska's history since statehood reveals no example of judicial corruption: no bribery, no payoffs, no other scandals. As Thomas B. Stewart, the Secretary of the Constitutional Convention and a primary architect of the Constitution, wrote in 2004:

Alaska is fortunate to have the constitutional guarantee of the merit system for the selection of judges. Our merit system has worked well in Alaska. It has produced high quality judges with integrity and abundant skills, and it has kept out corrupting political influences that trouble other states.<sup>211</sup>

Ten former Alaska attorneys general, who had been appointed by governors from across the political spectrum, highlighted the absence of corruption in the history of the Alaska judiciary in urging the legislature to reject SJR 3. They wrote: "Almost uniquely among the states, Alaska's judiciary has been free of the taint of corruption and scandal that has plagued so many other state judiciaries."<sup>212</sup>

Editorial comment has also noted the absence of problems encountered elsewhere. During debate on the issue whether the governor had the right to demand more nominees from the Judicial Council, the *Anchorage Daily News* defended the merit system in these terms: "The wisdom of the constitutional framers has been demonstrated again and again. The system works. . . . Neither partisanship nor cronyism nor political pandering has ever gotten a firm grip on Alaska courts . . ."<sup>213</sup>

Charlie Cole, Attorney General of Alaska from 1991 to 1994, wrote in opposition to SJR 21 in 2014, that popular election or partisan appointment systems in other states had "too often created judiciaries

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210. See generally Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431 (2004) (documenting hundreds of instances of judicial misconduct); CYNTHIA GRAY, AM. JUDICATURE SOC'Y, A STUDY OF STATE JUDICIAL DISCIPLINE SANCTIONS 167 (2002), available at <https://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/Publications/Study-of-State-Judicial-Discipline-Sanctions.ashx> (pointing to hundreds of instances of judicial misconduct in the United States, but only two in Alaska).

211. Thomas B. Stewart, *Judicial Merit System Best for Alaskans*, ANCHORAGE DAILY NEWS, Sept. 26, 2004, at F2.

212. Letter from Ten Former Alaska Attorneys General to Alaska legislators (Dec. 8, 2015), [http://justicenotpoliticalalaska.org/uploads/3/7/6/8/37689611/letter\\_from\\_former\\_alaska\\_attorneys\\_general.pdf](http://justicenotpoliticalalaska.org/uploads/3/7/6/8/37689611/letter_from_former_alaska_attorneys_general.pdf).

213. Editorial, *Murkowski Overreaches*, ANCHORAGE DAILY NEWS, Sept. 5, 2004, at H2.

tainted by corruption, cronyism, bias, and mediocrity, if not outright incompetence.”<sup>214</sup>

## 2. Professional Assessment

The judgments of others, especially legal professionals from both outside and inside Alaska, lend strong support to the conclusion that merit selection has created a highly functioning judicial system.

Dean Erwin Chemerinsky, who has reviewed all of the opinions of the Alaska Supreme Court and the Alaska Court of Appeals each year since 2003, and who has addressed the combined Alaska Bar and bench at their yearly conference since 1990 on Alaska constitutional opinions, had this to say recently about the experience:

It is an enormous pleasure each year to read all the Alaska published opinions so as to go through this process. As I say each year, I come away from that experience absolutely convinced that in Alaska you have the very best appellate judges of any state in the country.<sup>215</sup>

Dean Chemerinsky has also expressed this sentiment to a broader audience. In his 2014 book *The Case Against the Supreme Court*, Dean Chemerinsky wrote that Alaska’s system “has truly been a merit-selection process and has produced courts with excellent judges.”<sup>216</sup> He stated further that “the Alaska Judicial Council sees its task as identifying those who will be outstanding judges, without regard to their political party or ideology,”<sup>217</sup> and praised the “high quality” of judicial opinions issued by the Alaska Supreme Court and the Alaska Court of Appeals.<sup>218</sup> After briefly comparing Alaska’s judicial selection process with those found in other states, Chemerinsky concluded that “the best selection process is one that truly emphasized merit, and Alaska’s has succeeded in this regard.”<sup>219</sup>

When the question of Alaska’s merit selection system was debated broadly in 2015 with the introduction of SJR 3, ten of Alaska’s former

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214. Charlie Cole, Opinion, *Stacking Alaska Judicial Council Would Be a Mistake*, ANCHORAGE DAILY NEWS (Mar. 12, 2014), <https://www.adn.com/commentary/article/compass-stacking-alaska-judicial-council-would-be-mistake/2014/03/13/>.

215. Videotape: Erwin Chemerinsky, Alaska Appellate Law Update, Address at the Alaska Bar Convention (May 23, 2016) (on file with the Alaska Bar Association).

216. ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* 299–300 (2014).

217. *Id.* at 299.

218. *Id.* at 298.

219. *Id.* at 300.

attorneys general, from across the political spectrum, spoke out sharply against modifying Article IV. The former attorneys general jointly signed an open letter to the Alaska Legislature that began by noting their common perspective:

Each of us has served as Alaska Attorney General. Having seen our judiciary system up close, we are deeply concerned by recent efforts to amend the Alaska Constitution in a way that would introduce politics into the selection of Alaska's judges. We oppose Senate Joint Resolution 3, presently pending before the Senate, because it would weaken one of the best judicial selection and retention systems in America.<sup>220</sup>

The former attorneys general emphasized their agreement on the excellence of Alaska's merit selection system despite their broad differences in background and service:

We served Republican and Democratic governors who came from all segments of the political spectrum. But we agree that our Constitutional framers got it right when they created a merit selection system that ensures that only the most qualified judicial applicants—the “tallest timber”—will be nominated for the governor to consider appointing to the bench.<sup>221</sup>

They concluded their open letter to the legislature with a clear call to reject the attempt to amend Article IV: “The Alaska Constitution's Judiciary Article has served the state well and should not be amended. Please reject SJR 3.”<sup>222</sup>

Even those who have advocated for changing Alaska's Constitution have expressed a desire to leave the merit-based selection system intact. Former Alaska Attorney General John Havelock, who has urged the convening of a Constitutional Convention to address what he perceives as weaknesses in the Alaska Constitution, commented that “the Judicial Article . . . was a triumph of reason at the [C]onstitutional [C]onvention and has served this state well.”<sup>223</sup> Concerning the balance struck by the framers regarding judicial selection, Havelock concluded that “there seems to be no compelling reason” to change the balance of power between the governor and the Judicial Council.<sup>224</sup> He added that “[t]he existing arrangement [of the Judicial Council] has presented no visible problems and no changes seem appropriate.”<sup>225</sup>

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220. Letter from Ten Former Alaska Attorneys General, *supra* note 212.

221. *Id.*

222. *Id.*

223. JOHN HAVELOCK, LET'S GET IT RIGHT 88 (2012).

224. *Id.* at 86.

225. *Id.*



Looking to a 60-year history that is devoid of any significant problems, and to the considered opinions of legal professionals of all political persuasions, both inside and outside Alaska, we conclude that the merit selection system has succeeded in creating and sustaining an independent and competent judiciary.

## V. CONCLUSION

The delegates to Alaska's Constitutional Convention understood well the tension between an independent judiciary and popular sovereignty. The delegates sought to balance these tensions by creating the Judicial Council, evenly divided between attorneys, who would know well the abilities of their fellow attorneys, and lay members, who would represent the broader public, to find the best qualified candidates to nominate for appointment. The delegates then provided for the choice among the best qualified to be made by the governor, recognizing that elections have consequences. Finally, the delegates provided for the people to have the final say, after a suitable period on the bench for the new judge to develop a record.

The delegates above all wished to assure that the new state would have a judiciary that was independent of the other branches of government, that would render fair decisions based on the law, and that would be free of political influences and considerations.

Article IV has survived challenges both in court and in the legislature. And, as the Alaska Constitution begins its seventh decade, merit selection has been widely recognized as the best vehicle to assure the continued excellence of the Alaska judicial system.