RETAINING JUDICIAL INDEPENDENCE: SOLUTIONS TO INCREASING THREATS TO ALASKA'S JUDICIAL MERIT SYSTEM

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ABSTRACT

While the judicial merit system in Alaska has effectively balanced accountability with the competing need for independence in the judiciary, the growing trend of politicized retention elections threatens that independence. This Note examines the threat to the Alaskan judicial merit system, argues for the importance of protecting an independent judiciary, and proposes a number of potential solutions to reform or replace the current retention election system.

I. INTRODUCTION

In 2018, Alaska's judicial retention election resulted in an outcome unprecedented in the state's history: voters rejected a judge who had been recommended for retention by the Judicial Council.[1] While a number of factors likely contributed to this outcome,[2] the most significant was that

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1. Daniella Rivera, *Preliminary Numbers Suggest Voters Will Oust Judge Corey Following No-Jail Plea Deal*, KTVA (Nov. 7, 2018, 12:17 AM) [hereinafter Rivera, *Preliminary Numbers*], https://www.ktva.com/story/39432108/hfr-judicial-retention (intimating that poll results from the majority of precincts suggest that the incumbent judge narrowly lost the election); Michelle T. Boots, *Voters Oust Anchorage Judge Targeted for Role in Controversial Plea Agreement*, ANCHORAGE DAILY NEWS (Nov. 10, 2018), https://www.adn.com/alaska-news/2018/11/06/anchorage-judge-targeted-for-role-in-controversial-plea-agreement-trailing/.

2. For example, of all states that use judicial retention elections, Alaska has the lowest baseline support for retention. *See* Albert J. Klumpp, *Alaska's Judicial Retention Elections: A Comparative Analysis*, 34 ALASKA L. REV. 143, 152 (2017)

the judge who was not retained, Michael Corey, faced a coordinated anti-retention campaign resulting from a single decision.[3] The campaign centered around backlash against Judge Corey for having accepted a plea deal in a case of alleged sexual assault where the evidence strongly indicated the defendant's culpability. Coordinated anti-retention campaigns had happened before.[4] Some of those past campaigns had even focused on decisions in a single case.[5] However, up until 2018, none of those campaigns had ever succeeded.

That such targeted campaigns had not previously prevailed is a testimony to the strength of Alaska's judicial merit system. The judicial merit system was conscientiously designed to avoid undue influence on judges.[6] To that end, the system includes two components. First, in the selection process, a non-partisan committee, called the Judicial Council, seeks to identify the most qualified candidates and then passes those names on to the governor for the final nomination.[7] Second, the merit system includes retention elections for judges.[8] The purpose of these retention elections is to remove judges who are not properly undertaking

(finding Alaska had the lowest baseline median approval rating of judges in retention elections among all states that use them between 1996 and 2016).

3. *See* Daniella Rivera, *Alaskans Rally Against Judge's Retention After Schneider Plea Deal*, KTVA (Oct. 7, 2018, 3:51 PM) [hereinafter Rivera, *Alaskans Rally*], https://www.ktva.com/story/39244261/alaskans-rally-against-judges-retention-after-schneider-plea-deal (detailing a coordinated movement against Judge Corey for his decision in a particular criminal case).

4. For example, Justice Dana Fabe faced a coordinated anti-retention campaign by social conservatives in 2010 for decisions she had made on abortion and gay rights. Michelle Theriault Boots, *Anchorage Judge Targeted in Retention Battle Speaks Publicly for First Time Since Controversial Plea Agreement*, ANCHORAGE DAILY NEWS (Oct. 7, 2018), https://www.adn.com/Alaska-news/2018/10/02/anchorage-judge-targeted-in-retention-battle-speaks-publicly-for-first-time-since-controversial-plea-agreement/. These coordinated campaigns had also targeted lower court judges; Anchorage Superior Court Judge Sen Tan faced a coordinated anti-retention campaign for his pro-choice and "activist" decisions. Annie Feidt, *Group Targeting Superior Court Judge up for Retention*, ALASKA PUB. MEDIA (Nov. 1, 2012), https://www.alaskapublic.org/2012/11/01/group-targeting-superior-court-judge-up-for-retention/.

5. *See* Andrew Kitchenman, *Abortion Ruling at Center of Justices' Retention Battle*, ALASKA PUB. MEDIA (Nov. 2, 2016), https://www.alaskapublic.org/2016/11/02/abortion-ruling-at-center-of-justices-retention-battle/ (explaining how two supreme court justices were targeted for a specific pro-choice decision in which they had taken part).

6. *See* Teri White Carns & Susie Mason Dosik, *Alaska's Merit Selection of Judges: The Council's Role, Past and Present*, 35 ALASKA L. REV. 177, 178 (2018) (noting that the system's creators intended to devise a system that rewarded merit rather than political connections).

7. ALASKA CONST. art. IV, § 5; *Proceedings of the Alaska Constitutional Convention* [hereinafter PACC], at 594, *available at* https://akleg.gov/pages/constitutional_convention.php (remarks of Del. R. Rivers).

8. ALASKA CONST. art. IV, § 6.

their judicial duties.[9] Yet the past several cycles of judicial elections, especially the non-retention of Judge Corey, have revealed that removal efforts based on a single unpopular decision, or a small group of decisions, are an increasingly prominent threat to judicial independence in Alaska.

This Note will examine how to respond to that growing threat. Part II outlines the judicial merit system and examines recent challenges to the system's selection component. Part III examines the dangers that retention elections pose to judicial independence. It first looks at the history of retention elections across the United States and shows how changing conditions have led to increased targeting of judicial retention candidates, making retention elections look more like competitive judicial elections. After examining the United States broadly, Part III explores how Alaska is also at risk of becoming part of the same trend. Finally, Part IV proposes potential solutions to mitigate those risks and protect Alaskan judges from improper influences as Alaska's Framers intended. It first looks at changes within the existing system. Then it considers the potential benefits and costs to replacing the retention election component of Alaska's judicial merit system. Ultimately, it concludes that although the system has worked well to this point, recent trends indicate that retention elections risk undermining the entire system. Thus, in the interest of maintaining judicial independence, retention elections should be replaced with a retention process in which the Judicial Council decides retention rather than recommending outcomes.

II. AN OVERVIEW OF ALASKA'S JUDICIAL MERIT SYSTEM

A. Origins & The System Today[10]

Alaska's Framers crafted the judicial merit system to focus on selecting judges based on their competence rather than their political connections.[11] The Framers wanted the judiciary to be independent from

9. PACC, *supra* note 7, at 599 (remarks of Del. Davis). For example, in 2014, the Judicial Council recommended not retaining a judge who falsely swore under oath that he had completed decisions. Ellen Lockyer, *Alaska Judicial Council Recommends All but 1 Judge for Retention*, ALASKA PUB. MEDIA (June 11, 2014), https://www.alaskapublic.org/2014/06/11/alaska-judicial-council-recommends-all-but-1-judge-for-retention/.

10. Because this journal has extensively covered the history of the Alaskan judicial merit system in Walter L. Carpeneti & Brett Frazer's article, *Merit Selection of Judges in Alaska: The Judicial Council, The Independence of the Judiciary, and the Popular Will*, 35 ALASKA L. REV. 205 (2018), discussion of that topic has largely been omitted from this piece.

11. Carns & Dosik, *supra* note 6, at 178.

the influence of political parties, individuals, and special interest groups.[12] They believed that the only way to ensure such independence was to avoid a system where judges were completely dependent on politicians for their selection.[13] Instead, a Judicial Council with a mix of lawyers and laymen would select judges.[14] The lawyers would know who was competent and have self-interest in selecting qualified judges.[15] The laymen on the Council would provide a check on the lawyers and supply a form of public input.[16] In order to incorporate democratic accountability, the governor, an elected official, would be the final decision-maker by selecting one of the judicial nominees put forward by the Judicial Council.[17] A now-famous quote from one of the Convention delegates sums up the merit selection process: "[T]he judicial council will seek for the best available timber, and we take a bow to the governor in taking his choice of two persons that are nominated . . . ."[18]

Although the selection system partially insulated judges, Alaska's Framers wanted to ensure that judges were accountable for their performance on the bench while still not letting politics creep into the process.[19] They worried judges could abuse lifetime tenure by becoming unresponsive to the will of the people and refusing to change with the times.[20] They also wanted a method to remove judges from the bench who were not adequately performing their duties.[21] However, they worried competitive elections could undermine judicial independence through the incurring of "financial and psychological debts"[22] and would result in a judge having to "keep peering over his shoulder to find out whether [a

12. PACC, *supra* note 7, at 596 (remarks of Del. V. Rivers) (quoting Hawaii Legislative Handbook) ("Independence of the judiciary is a fundamental principle of our American court system . . . . [T]he 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.").

13. *See* Buckalew v. Holloway, 604 P.2d 240, 245–46 (Alaska 1979) (explaining that judges cannot be truly independent in a system where they serve at the pleasure of others, such as in a system where governors are solely responsible for appointment).

14. PACC, *supra* note 7, at 585 (remarks of Del. McLaughlin).

15. *Id.* at 585–86 (remarks of Del. McLaughlin).

16. *Id.* at 585 (remarks of Del. McLaughlin).

17. Carpeneti & Frazer, *supra* note 10, at 207.

18. PACC, *supra* note 7, at 594 (remarks of Del. R. Rivers).

19. *See* Buckalew v. Holloway, 604 P.2d 240, 244 (Alaska 1979) ("The framers of the Alaska Constitution expressly sought a system in which justices and judges would be accountable for their performance in office.").

20. PACC, *supra* note 7, at 598 (remarks of Del. Davis).

21. *See id.* at 599 (remarks of Del. Davis) ("[T]he plan which is set up here gives the best of the two systems with the result that when the procedure is followed we have taken the best means yet devised . . . to get rid of judges who are not able to properly do their job.").

22. *Buckalew*, 604 P.2d at 245.

decision in the lead-up to an election] is popular or unpopular."[23]

To balance these competing concerns, Alaska's Framers chose retention elections, which are a Progressive Era innovation intended to limit the influence of politics on judges while maintaining some accountability to the electorate.[24] The Framers decided retention elections could avoid the threats to judicial independence involved with other types of judicial elections.[25] Alaska's Framers did not want the judiciary to be swayed by the public at particular moments, so they sought to avoid situations where judges were voted out of office based on the "whims of the time" or a decision in one particular case.[26] As a result, the retention election system recognizes that voter outrage is a source of *undue* influence.[27] Both the Framers' statements and the system's design emphasize that retention elections are supposed to be based on a judge's complete record, not a single case.

While the judicial merit system today aligns strongly with those founding values, the Judicial Council has updated its processes over time in order to better attract the most qualified candidates to the judiciary.[28] For example, in the mid-1970s, the Judicial Council began requesting additional information such as writing samples and examples of litigated cases which applicants had worked on to better assess potential judges.[29] In the 1976 elections, the Judicial Council started conducting retention evaluations.[30] The Judicial Council then updated the retention procedures to increase public input during the 1990s.[31] The retention-based reforms ultimately also help attract the most qualified candidates by providing higher quality information for the electorate and thus better job security for judges facing retention.[32]

23. PACC, *supra* note 7, at 584 (remarks of Del. McLaughlin); *see also* Carpeneti & Frazer *supra* note 10, at 213 (interpreting the passage in the same manner).

24. Klumpp, *supra* note 2, at 146.

25. *Buckalew*, 604 P.2d at 245–46; Carpeneti & Frazer, *supra* note 10, at 212.

26. PACC, *supra* note 7, at 598 (remarks of Del. Davis).

27. *See Buckalew*, 604 P.2d at 246 (contrasting influence of presiding judge with "undue influence potential in voter outrage").

28. Carns & Dosik, *supra* note 6, at 183–84.

29. *Id*. at 183.

30. KEVIN M. ESTERLING & KATHLEEN M. SAMPSON, JUDICIAL RETENTION EVALUATION PROGRAMS IN FOUR STATES: A REPORT WITH RECOMMENDATIONS 76 (1998), http://www.judicialselection.us/uploads/documents/Jud_Ret_Eval_Report_Full_1EB9F38566F5A.pdf.

31. *Id*. at 80.

32. *Cf.* ALICIA BANNON, BRENNAN CTR. FOR JUSTICE, CHOOSING STATE JUDGES: A PLAN FOR REFORM 1 (2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Choosing_State_Judges_2018.pdf (arguing against any judicial elections because they introduce uncertainty that can undermine job security).

Today, judges are initially appointed by the governor from a list of choices developed by the non-partisan Judicial Council, which ensures judges are qualified on their merits.[33] After that, rather than the judge facing an opponent for reelection, judges must regularly face retention elections in which the public votes "either 'yes' or 'no' on whether the judge should remain in office."[34] As part of the retention elections, the Judicial Council recommends for or against retention.[35] Judges cannot actively campaign unless there is an anti-retention campaign.[36] A judge can be retained an unlimited number of times up to the mandatory retirement age of 70.[37]

As dictated by the Alaska Constitution, the Judicial Council has seven members: three attorneys with six-year terms appointed by the Alaska Bar; three non-attorneys appointed by the governor and subject to majority confirmation by the legislature also with six-year terms; and the chief justice of the Alaska Supreme Court who serves as an ex-officio member and a tie-breaking vote.[38] Appointments to the Council are subject to two criteria; they are to be made with "due consideration" to geographic representation and cannot be made with regard to political affiliation.[39]

The Judicial Council's selection process begins when it receives notice of an imminent or existing judicial vacancy.[40] To fill the vacancy, the Judicial Council starts an application process by posting vacancies online and in the press.[41] It looks for people who "stand out as most qualified" from the Council's consideration of numerous traits.[42] The applicants are asked to provide a myriad of professional information.[43]

33. ALASKA COURT SYS., ALASKA'S CONSTITUTION: SELECTING JUDGES BASED ON MERIT AND JUDICIAL RETENTION ELECTIONS (Mar. 2017), https://public.courts.alaska.gov/web/forms/docs/pub-28.pdf.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. ALASKA CONST. art. IV, § 8; Carns & Dosik, *supra* note 6, at 177–78.

39. ALASKA CONST. art. IV, § 8.

40. Kirk v. Carpeneti, 623 F.3d 889, 894 (9th Cir. 2010).

41. Carns & Dosik, *supra* note 6, at 186.

42. Those traits include: "professional competence, including written and oral communication skills; integrity; fairness; temperament; judgment, including common sense; legal and life experience; and demonstrated commitment to public and community service." *Id.* at 184.

43. This information includes: work and education history; why they are seeking nomination and why they think they are well-qualified; lay and attorney references; six cases the attorney has worked on in the last three years, so that the Council can contact those involved; a writing sample, and information to evaluate potential conflicts of interest. *Id.* at 187. The Judicial Council also requests certifications of competence to serve along with a release of records that may be

Next, the Judicial Council interviews the applicants.[44] Finally, the Judicial Council gets public input from members of the Bar and lay people. Members of the Bar are invited to fill out surveys with comments,[45] while members of the public are invited to provide comments online or at public hearings.[46] The Judicial Council holds these hearings in communities that will be impacted by the new judge, and the hearings are usually well-attended.[47] The Judicial Council then votes, and nominees with at least four votes are forwarded to the governor along with all the public information the Council gathered.[48] The governor is then required to fill the vacancy by appointing one of the Judicial Council's nominees.[49]

Shifting to the second part of the system, every judge must face her first retention election at the first general election held more than three years after her appointment.[50] A judge must receive a majority of the votes to be retained.[51] Judges who are retained face elections at regular intervals thereafter.[52] If judges wish to be considered for retention, they must declare that intention by August 1 of the year of the election.[53]

As part of the retention election, every household on the registered voters list receives information including: the Judicial Council's recommendation for or against retention; a short statement from the Judicial Council evaluating judicial performance; and a picture and short advocacy statement from the judge.[54] The Judicial Council's recommendations started in 1976 as a means of correcting the typical dearth of information voters have about judicial candidates.[55] The

necessary to investigate such capacity, as well as Bar files and the applicant's criminal record. *Id.* at 191–93.

44. *Id.* at 195.

45. *Id.* at 190.

46. *Id.* at 198.

47. *Id.*

48. ALASKA CONST. art. IV, § 5; Carns & Dosik, *supra* note 6, at 201–02.

49. ALASKA CONST. art. IV, § 5; ALASKA STAT. § 22.07.070 (2020); ALASKA STAT. § 22.15.170(a)–(b) (2020); Carns & Dosik, *supra* note 6, at 201–02.

50. ALASKA CONST. art. IV, § 6. One exception is district court judges who, due to their shorter retention terms, face their first retention election at the first general election held more than two years after their appointment. ALASKA STAT. § 15.35.100(a) (2020).

51. ALASKA CONST. art. IV, § 7; ALASKA STAT. § 15.15.450 (2020).

52. Supreme Court justices face retention every ten years. ALASKA CONST. art. IV, § 6. Court of appeals judges face retention every eight years. ALASKA STAT. § 15.35.053 (2020). Superior court judges face retention every six years. ALASKA CONST. art. IV, § 6. District court judges face retention every four years. ALASKA STAT. § 15.35.100(a) (2020).

53. ALASKA STAT. §§ 15.35.040, .055, .070, .110 (2020).

54. *Id.* §§ 15.58.010, .020, .030(g), .050.

55. *See* Seth S. Andersen, *Judicial Retention Evaluation Programs*, 34 LOY. L.A. L. REV. 1375, 1375 (2001) ("Judicial retention evaluation programs are a key component of efforts to make judicial retention elections more meaningful

recommendations are based on surveys from different people who interact with the courts, court records, public input, and statewide public hearings.[56] The recommendations also look at factors meant to ensure a judge is competent including disqualification rate, affirmation or reversal rate on appeal, disciplinary proceedings, and whether the judge has regularly rendered timely decisions.[57] By including public input and focusing on judicial competence, the recommendations not only ensure access to information about the judges, but also reduce dependence on interest groups and the media who may have political motivations.[58]

While judges seeking retention are subject to the state election campaign statute,[59] most of the restrictions on their conduct in retention elections come from the state judicial ethics canon, the Alaska Code of Judicial Conduct.[60] One key provision bans judges from making any promises about how they will decide cases beyond saying that they will faithfully apply the law.[61]

The remainder of the Code of Judicial Conduct is split between what judges can do before and after active opposition. The Code does not

contests for voters by providing objective, survey-based information on the performance of judges standing for retention."); BANNON, *supra* note 32, at 5; AM. BAR ASS'N, JUDICIAL SELECTION: THE PROCESS OF CHOOSING JUDGES 9 (2008), https://www.americanbar.org/products/ecd/ebk/217453/.

56. The people surveyed include: police officers, court employees, attorneys, jurors, and social workers. ALASKA COURT SYS., *supra* note 33; *Frequently Asked Questions about Retention*, ALASKA JUDICIAL COUNCIL, (last visited Aug. 31, 2020), http://www.ajc.state.ak.us/retention/faq.html.

57. Carpeneti & Frazer, *supra* note 10, at 209. For a more complete explanation of the process and to see an example of the performance evaluations, *see* ALASKA JUDICIAL COUNCIL, *supra* note 56.

58. *See* Andersen, *supra* note 55, at 1378 (highlighting that performance evaluations help counter the politically-motivated evaluations from interest groups); AM. BAR ASS'N, *supra* note 55, at 14 (explaining that performance reviews and statements from candidates reduce dependence on interest groups and media).

59. ALASKA STAT. § 15.13.010(a)(1) (2020).

60. ALASKA CODE OF JUDICIAL CONDUCT (1998).

61. *Id.* at CANON 5A(3)(d) (1998). While this provision may face First Amendment challenges under *Republican Party of Minnesota v. White*, *see* 536 U.S. 765, 788 (2002) (striking down a similar, although not identical, provision in Minnesota's Code of Judicial Conduct on First Amendment grounds), the executive director of Alaska's Commission on Judicial Conduct—the body that oversees judicial ethics in Alaska—has argued Alaska's provision is distinguishable and the Code of Judicial Conduct itself says that it should be interpreted so as to avoid violating the First Amendment. Alaska Right to Life Political Action Comm. v. Feldman, 504 F.3d 840, 846 (9th Cir. 2007); ALASKA CODE OF JUDICIAL CONDUCT CANON 5A(3)(d) Commentary (1998). The Ninth Circuit did not reach the merits in a lawsuit over the provision; the lawsuit involved Alaska Right to Life's questionnaire asking judges their position on issues such as abortion, and judges declined to substantively respond for fear of violating the Code of Judicial Conduct. *Alaska Right to Life*, 504 F.3d at 843–44.

define active opposition. Instead, it says the term should be broadly construed and can include a negative recommendation, press conferences, ads, and similar publicity even if they do not target a specific judge.[62] However, it also says individuals speaking at Judicial Council hearings are unlikely to count.[63] Importantly, no deadline exists for declaring one's intention to oppose a judge's retention,[64] and recent history has seen active opposition arise as late as a few days prior to an election.[65]

Before active opposition arises, judges can, if unsolicited, speak at public gatherings or in the media to discuss their candidacy.[66] However, if they anticipate active opposition and can document the reason for their suspicions, judges can also form an election campaign committee and prepare media and campaign materials.[67] Once active opposition exists, judges can, through their campaign committee, publish advertisements and other campaign materials.[68] Judges may only campaign based on their fitness as a judge,[69] and the standard for campaigning is reasonableness.[70] The Commission on Judicial Conduct can investigate any alleged violation of the Code on its own motion or based on a written complaint.[71] However, the Commission can only recommend punishment, which must ultimately come from the Supreme Court in the form of a reprimand, public or private censure, suspension, or removal or retirement from judicial office.[72]

Alaska's judicial merit system has been recognized as one of the best in the country. The American Bar Association and a former United States Supreme Court justice have recognized the important benefits of judicial merit systems.[73] Studies have also found empirical support for the balance of political insulation and accountability that the initial selection process

62. ALASKA CODE OF JUDICIAL CONDUCT CANON 5C(2) Commentary (1998).
63. *Id.*
64. ALASKA COURT SYS., *supra* note 33.
65. Tracy Kalytiak, *Mailer Targets Justice Fabe*, MAT-SU VALLEY FRONTIERSMAN (Oct. 30, 2010), https://www.frontiersman.com/news/mailer-targets-justice-fabe/article_599d1e7a-4b40-55f9-8d5d-23b0b775e0e0.html.
66. ALASKA CODE OF JUDICIAL CONDUCT CANON 5C(1)(b) (1998).
67. *Id.* at CANON 5C(1)(c)–(d) & Commentary.
68. *Id.* at CANON 5C(2)–(3).
69. ALASKA COURT SYS., *supra* note 33.
70. ALASKA CODE OF JUDICIAL CONDUCT CANON 5C(3) & Commentary (1998).
71. ALASKA STAT. § 22.30.011(a)(3)(E) (2020).
72. *Id.* § 22.30.011(d)(2).
73. *See* Republican Party of Minn. v. White, 536 U.S. 765, 791 (2002) (O'Connor, J., concurring) (emphasizing that the Missouri Plan, on which Alaska's system is based, reduces the threat of judicial impartiality from elections); AM. BAR ASS'N, *supra* note 55, at 7, 9 (recognizing that merit selection encourages community involvement, limits political favoritism, ensures that judges are well-qualified, and helps attract more diverse candidates).

creates.[74]

Legal professionals have also recognized Alaska as a leader in judicial independence. Attorneys general from both Democratic and Republican administrations have applauded its excellence.[75] Alaska follows former United States Supreme Court Justice Sandra Day O'Connor's quality judicial initiative plan.[76] Further, the judiciary has a strong reputation for efficiency and integrity both within the state and nationwide, which is punctuated by the lack of corruption or malfeasance.[77] Perhaps nothing is more indicative of its success than the fact that, prior to Judge Corey, only five judges were not retained in the over sixty year history of the state.[78] A study looking at every retention election in Alaska between 1976 and 1996 found a positive correlation between Judicial Council ratings and retention votes, suggesting the retention system is trusted by Alaskans.[79] All of this success is why Alaska's judicial merit system is worth protecting against challenges that seek to undermine its founding principles, the topic to which this Note turns next.

B. Recent Challenges to the Judicial Merit System

In recent years, the selection part of Alaska's judicial merit system has come under increasing assault by individuals seeking to undermine the independence the selection process engenders.[80] Periodically, governors have contravened their constitutional obligation by attempting to appoint someone other than a Judicial Council nominee.[81] For example, in 2004, Governor Frank Murkowski rejected all the names on the appointment list.[82] Following a strong public outcry about the need for judicial independence, Governor Murkowski backed down and

74. *See* BANNON, *supra* note 32, at 6–7, 9 (recognizing that the combination of a nominating committee and gubernatorial appointment produces effective political insulation while maintaining accountability).

75. Carpeneti & Frazer, *supra* note 10, at 233.

76. JUSTICE SANDRA DAY O'CONNOR & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., THE O'CONNOR JUDICIAL SELECTION PLAN 9 (2014) [hereinafter O'CONNOR JUDICIAL SELECTION PLAN].

77. MICHAEL L. BOYER, *The State Courts and Alaska Politics: Independence, Public Accountability, and Political Influence*, *in* ALASKA POLITICS AND PUBLIC POLICY 605, 625 (Clive Thomas et al. ed., 2016); Carpeneti & Frazer, *supra* note 10, at 233.

78. Carns & Dosik, *supra* note 6, at 202.

79. ESTERLING & SAMPSON, *supra* note 30, at 70.

80. *See* Klumpp, *supra* note 2, at 144 (explaining how proposed changes to the Judicial Council's makeup would result in the governor's increased influence over the selection process).

81. ALASKA CONST. art. IV, § 5; ALASKA STAT. §§ 22.07.070, .15.170(a)–(b) (2020); Carpeneti & Frazer, *supra* note 10, at 221.

82. Boyer, *supra* note 77, at 618.

appointed one of the original nominees.[83]

More recently, the challenges have taken different forms.[84] In 2009, challengers filed a lawsuit claiming that the judicial merit selection system violated the Equal Protection Clause of the Fourteenth Amendment because attorneys had more voting power via their control over the Bar's nominees to the Judicial Council.[85] The district court dismissed the suit on three grounds: the initial selection of judicial nominees by the Judicial Council did not involve an election so the lack of voting equality was not a valid claim; the Bar's Board of Governors was within the limited purpose exception of one person, one vote; and one person, one vote did not apply for appointments of non-legislative officers.[86] On appeal, the Ninth Circuit unanimously affirmed the district court's ruling.[87] The court chastised the plaintiffs for attempting to enact a policy change on the method of selecting judges without going through the state constitutional amendment process.[88]

Following the Ninth Circuit's suggestion,[89] opponents of the judicial merit system then tried to change the method of selecting judges by amending Alaska's constitution.[90] In 2014, the challengers put forth a Senate resolution to limit the role of attorneys on the Judicial Council while increasing the power of the governor.[91] The power shift in the Judicial Council would have been accomplished by doubling the number of non-attorney members selected by the governor and making attorney members subject to legislative confirmation.[92] Sharp bipartisan opposition to the resolution emerged based on a fear that the change would undermine the independence of the judiciary and increase the influence of politics in the selection and retention of judges.[93] The resolution was withdrawn before a full floor vote in the state senate.[94]

In the legislature, several bills have been introduced that seek to

83. *Id.*

84. For a more extensive review of historical challenges to the confirmation process, see Carpeneti & Frazers' article, *supra* note 10.

85. *Id.* at 221–22.

86. *Id.* at 222–23.

87. Kirk v. Carpeneti, 623 F.3d 889, 900 (9th Cir. 2010); Carpeneti & Frazer, *supra* note 10, at 223.

88. *Kirk*, 623 F.3d at 891, 900.

89. For a more extensive review of attempts to amend Article IV of the Alaska Constitution, see Carpeneti & Frazer's article, *supra* note 10, at 225–27.

90. *Id.* at 225.

91. *Id.* at 225 & n.150; Klumpp, *supra* note 2, at 144.

92. Carpeneti & Frazer, *supra* note 10, at 225–26.

93. *See About Us*, JUSTICE NOT POLITICS ALASKA (last visited Aug. 31, 2020), http://justicenotpoliticsalaska.org/pages/about-us/ (describing how and why the organization was founded in response to efforts to amend Article IV).

94. Carpeneti & Frazer, *supra* note 10, at 227.

expand the options for removing judges from the bench. For example, in 2017, HB 251 sought to make the exercise of legislative power by a judicial official an impeachable offense and shield any such impeachment from judicial review.[95] While that bill never advanced from committee,[96] it may foreshadow increased scrutiny of judges based on individual rulings and policy disagreements. A number of factors, both nationwide and specific to Alaska, make retention elections increasingly vulnerable to political influence that corrodes judicial independence.

III. INCREASING THREATS TO PRESERVING INDEPENDENCE AND MAINTAINING JUDICIAL ELECTIONS

A. Generalized Threats to Independence in Judicial Elections

Observers have long realized that judicial elections present a number of issues for judges.[97] The American Bar Association has recognized judicial elections can be both costly and time consuming and often provide no actual quality screen for the candidates.[98] Elections can also create challenging ethical dilemmas for judges.[99] Judicial elections frequently involve campaigns for or against certain candidates based either on perceptions of how they will rule on certain issues or as part of broader efforts to shape a court's ideological makeup.[100] Some commentators have concluded that the whole point of judicial elections is to ensure that judges cannot rule counter to the majority's view on issues.[101] States have sought to create restrictions on judicial politicization by barring judicial candidates from discussing their views on disputed issues that could come before the courts.[102] However, the United States

95. Bill Raftery, *Alaska: Bill Allows Legislature to Declare Judicial Decisions Impeachable "Malfeasance", Removes Judicial Review; Similar to 2016 Kansas Senate Effort*, GAVEL TO GAVEL (May 18, 2017), http://gaveltogavel.us/tag/alaska/?doing_wp_cron=1587432988.9185280799865722656250; ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, WHO PAYS FOR JUDICIAL RACES? 57 n.44 (Dec. 14, 2017).

96. *Bill History/Action for Legislature HB 251*, THE ALASKA STATE LEGISLATURE (May 15, 2017), https://www.akleg.gov/basis/Bill/Detail/30?Root=HB%20251#tab6_4.

97. *See, e.g.*, PACC, *supra* note 7, at 584 (remarks of Del. McLaughlin) (warning judges would constantly be checking the popularity of their decisions in an elective system).

98. AM. BAR ASS'N, *supra* note 55, at 8.

99. *Id*.

100. BANNON, *supra* note 32, at 4–5.

101. *Id.*

102. *See, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 768 (2002) (discussing a Minnesota prohibition against a judicial candidate "announc[ing] his or her views on disputed legal or political issues").

Supreme Court has found that those judicial ethics canons can violate the judge's First Amendment rights.[103] Taken together, these issues can undermine public trust in the courts by threatening judicial impartiality.[104]

Additionally, the influence of money in judicial elections has long been an issue.[105] A recent case that reached the United States Supreme Court, *Caperton v. A.T. Massey Coal Co.*,[106] shows the level of influence that interested parties can have on judges via campaign contributions.[107] In *Caperton*, a West Virginia jury had awarded the plaintiffs $50 million in damages.[108] Before the state's high court heard the appeal, Don Blankenship, the chairman, CEO, and president of the defendant corporation, Massey Coal, spent over $3 million to support a supreme court candidate through a combination of PAC contributions and independent expenditures.[109] Blankenship's preferred candidate won and then cast the deciding vote in favor of overturning the $50 million verdict against his company—twice.[110] The United States Supreme Court ruled the campaign contributions were of such an extraordinary amount that the probability of actual bias by the judge was so high that it violated the Fourteenth Amendment Due Process Clause.[111]

While most cases are not as egregious as *Caperton*, the influence of money on judicial decision-making is widespread. Research has found a correlation between donations and rulings that disappears when a judge is in her final term and will not be running for reelection.[112] There may be an increased cause for concern after *Citizens United v. FEC*,[113] which led to a spike in the amount of money spent in judicial races.[114] Consequently, the influence of money on judges may be even greater now than at the time of *Caperton*.

These influences have already impacted American perceptions of

103. *Id.* at 788.
104. *See* Sandra Day O'Connor, *The Essentials and Expendables of the Missouri Plan*, 74 MO. L. REV. 479, 480 (2009) (noting that "the public's trust in our courts is rapidly deteriorating").
105. WHITE PAPER ON JUDICIAL ELECTIONS, AM. COLL. OF TRIAL LAWYERS 1–2 (Oct. 2011) (noting how the flow of money only increased over the 2000s).
106. 556 U.S. 868 (2009).
107. WHITE PAPER ON JUDICIAL ELECTIONS, *supra* note 105, at 3.
108. *Caperton*, 556 U.S. at 872.
109. *Id.* at 873.
110. *See id.* at 874–75 (noting both decisions were three to two in favor of overturning the verdict).
111. *Id.* at 872.
112. BANNON, *supra* note 32, at 4.
113. 558 U.S. 310 (2010).
114. *See* WHITE PAPER ON JUDICIAL ELECTIONS, *supra* note 105, at 3 (explaining it was no accident that the spike in money spent in judicial races was in 2010, immediately following the *Citizens United* ruling).

judicial elections. Seventy percent of the American public believes judges are influenced by campaign contributions.[115] In 1991, after holding that judicial elections are within the scope of the Voting Rights Act, the United States Supreme Court recognized the "fundamental tension between the ideal character of the judicial office and the real world of electoral politics."[116] Judges themselves have increasingly acknowledged the corrosive influence of elections on judicial independence as well. Former California Supreme Court Justice Otto Kaus analogized deciding a controversial case when facing reelection to "finding a crocodile in your bathtub when you go in to shave in the morning. You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving."[117]

Empirical research supports concerns about this tension, with one study finding that more than a quarter of judges believe that campaign contributions affect their decisions.[118] For example, judges may be too afraid of the electoral consequences to enforce constitutional rights, or they may become "tougher" on crime in order to stay in office.[119] The primary fear is that when judges make different decisions based on electoral consequences, they undermine the legitimacy of their office.[120]

B. Growing Risk of Judicial Retention Elections Undermining Independence

These general concerns about judicial elections increasingly apply to non-competitive judicial retention elections as well. Retention elections are meant to walk a fine line by injecting accountability into the system while also protecting judicial independence.[121] In fact, Alaska's Framers implemented retention elections in order to strike just that balance.[122]

Nationally, however, there are increasing signs that the efficacy of

115. O'Connor, *supra* note 104, at 488.
116. Chisom v. Roemer, 501 U.S. 380, 400, 404 (1991).
117. Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1133 (1997).
118. O'Connor, *supra* note 104, at 488.
119. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 727–28 (1995).
120. O'Connor, *supra* note 104, at 489 ("All of this is deeply troubling because the legitimacy of the judicial branch rests entirely on its promise to be fair and impartial. If the public loses faith in that – if they believe that judges are just politicians in robes – then there is no reason to prefer their interpretation of the law or Constitution over the opinions of the real politicians representing the electorate.").
121. BANNON, *supra* note 32, at 5.
122. Buckalew v. Holloway, 604 P.2d 240, 244–45 (Alaska 1979).

this careful balance is weakening[123] More and more non-competitive retention elections are turning into "ideological battleground[s] over judicial philosophies and specific decisions . . . ."[124] This is particularly true in elections where there is higher funding, targeting by politicians and special interest groups, and increased media attention.[125] Some scholars have concluded that judicial retention elections are incompatible with the judicial function "since [they] amount[] to the imposition of decisional accountability on the courts and hold[] judges to 'standards that . . . are incompatible with the institutional integrity of the judiciary.'"[126]

In the past several decades, there has been an increasing number of contentious judicial retention elections.[127] In California's 1986 judicial retention elections, three sitting supreme court justices were ousted for their record of overturning capital sentences.[128] That retention election appeared to be an outlier, especially with its millions in spending, until 2010 when three sitting supreme court justices in Iowa were targeted by social conservatives and not retained for a decision that found that the state constitution included the right for same-sex couples to marry.[129] Since 2010, every election cycle has had at least one million-dollar judicial retention election covering a total of sixteen justices in five states.[130] Compared to zero such races between 1999 and 2009, it is clear that the impact of *Citizens United* is felt even in retention elections.[131] Given that the hot button issues that often cause these contentious retention elections are not limited to any particular state, this trend is likely to get worse.[132]

Research has also found other indications that retention elections have become more like competitive judicial elections. As a baseline matter, judges still know that an unpopular decision, even one required by law, can cost them their jobs.[133] Some judges who face retention

123. BANNON, *supra* note 32, at 10.
124. B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1431 (2001); ALASKA COURT SYS., *supra* note 33.
125. Ryan Fortson & Kristin S. Knudsen, *A Survey of Studies on Judicial Selection*, 32 ALASKA JUST. F., Summer/Fall 2015, at 11.
126. Dann & Hansen, *supra* note 124, at 1436.
127. For a more complete 20th century history of contentious judicial retention elections where judges were targeted for a small number of decisions, see Dann & Hansen, *supra* note 124, at 1431–35.
128. BANNON, *supra* note 32, at 21 n.91.
129. *Id.* at 10.
130. *Id.*
131. *Id.*; GREYTAK ET AL., BRENNAN CTR. FOR JUSTICE, BANKROLLING THE BENCH 13 (2015).
132. Dann & Hansen, *supra* note 124, at 1436.
133. GREYTAK ET AL., *supra* note 131, at 22; *see* BANNON, *supra* note 32, at 11 (discussing politicized judicial reselection in general).

elections are, perhaps as a result, making different decisions than those who do not face retention.[134] In addition, campaigns against judges based on their decisions on certain issues can actually make judges in non-partisan races more responsive to public opinion than judges who face partisan elections.[135] As a result, it seems increasingly likely that many of the ills of judicial elections in general may come to pass in retention elections as well.

C. Increasing Risk of Undue Influence in Judicial Retention Elections in Alaska

Alaska's elections are not immune to these ills. In line with scholars' warnings that no states are free from divisive issues in the courts, [136] Alaska's courts and judicial retention elections regularly see contentious topics play out. Alaskan courts are particularly prone to fights based around polarizing issues because they have a strong record of championing individual rights.[137] Further, Alaskan retention candidates have become among the most frequently targeted for removal in the nation, even in the absence of negative reviews from the Judicial Council.[138] In the 2010, 2012, and 2016 retention elections, judges were targeted for their rulings relating to abortion.[139] In 2018, Judge Corey was targeted by a campaign that grew out of the #MeToo movement.[140] Given this increased peril, it is likely that retention candidates will have to campaign more and spend more,[141] both of which can undermine judicial independence.[142]

Officials in and around the courts have increasingly recognized this danger. The Judicial Council's official online Frequently Asked Questions section warns against politicizing retention elections and basing them around contentious court decisions.[143] Further, the state's official

134. *See* Fortson & Knudsen, *supra* note 125, at 1, 9–10 (explaining that judges facing retention election are more likely to overturn lower court decisions).
135. *Id.* at 11.
136. Dann & Hansen, *supra* note 124, at 1436.
137. Boyer, *supra* note 77, at 610 (providing, as an example, a state case that held the state constitutional right to privacy in one's home protected possession of a small amount of marijuana for personal use in the home).
138. Klumpp, *supra* note 2, at 157.
139. Boots, *supra* note 4; Kitchenman, *supra* note 5.
140. *See* Rivera, *Alaskans Rally*, *supra* note 3 (describing protesters with #MeToo signs at a rally opposing Judge Corey's retention).
141. Klumpp, *supra* note 2, at 158.
142. AM. BAR ASS'N, *supra* note 55, at 8; O'Connor, *supra* note 104, at 480.
143. ALASKA JUDICIAL COUNCIL, *supra* note 56 ("Sometimes a judge is asked to resolve a contentious or divisive dispute, or a dispute involving a social issue. As in all cases, a judge must do his or her best to fairly and impartially apply the law,

pamphlet explaining the judicial merit system warns that the lack of a deadline for declaring one's intent to oppose a judge's retention "makes judges vulnerable to last-minute, *unfair* opposition campaigns."[144] Finally, a Continuing Legal Education (CLE) program in May 2017 was dedicated to the topic of "The Changing National Landscape in Judicial Retention and Its Implications for Alaska."[145] Introductory remarks to the CLE by former Chief Justice Carpeneti warned:

> In the 2016 election cycle, some results in Alaska's judicial retention elections caused many observers to wonder if our constitutional merit system is vulnerable to the possibility that coordinated non-retention campaigns against competent and qualified sitting judges could be successful, and that we may be close to losing the services of some really good and fair judges for reasons that have nothing to do with judicial merit.[146]

Recent cycles have shown this growing threat to retention elections in Alaska. In 2010, Justice Fabe was targeted by conservative groups for her rulings on abortion and gay marriage.[147] The main opposition came in the form of a mailer, specifically listing out decisions for which she was being targeted.[148] This mailer was sent out mere days before her election, which gave Justice Fabe little chance to respond before the election.[149] Also of note, this campaign was after *Citizens United* and most of the money for the mailer came from out-of-state groups.[150] Then, in 2012, Anchorage Superior Court Judge Tan was targeted for several 1990s cases in which he defended abortion rights.[151] Notably, the Judicial Council took the irregular step of running a few thousand dollars' worth of ads on Tan's behalf, which highlighted the Council's positive

even if it requires the judge to issue a decision that is unpopular, or which conflicts with the judge's personal beliefs. . . . From time to time, efforts are made to unseat a judge because of political or ideological disagreement with a particular decision. These efforts may be aimed at influencing future decisions of other judges . . . . [E]fforts to unseat a judge [for political reasons] diminish the neutrality and impartiality of our judiciary.").

144. ALASKA COURT SYS., *supra* note 33 (emphasis added).

145. This CLE is described in Klumpp, *supra* note 2. I owe special thanks to Dr. Klumpp for his help with this source. "[The CLE] addressed ethical issues and conflict-of-interest questions facing retention candidates and potential supporters and opponents, discussed the extent to which judges can campaign on their own behalf and solicit outside assistance, and shared stories of successful retention campaigns and the strategies that those campaigns employed." *Id.* at 144.

146. *Id.* at 145 (internal quotation marks omitted).

147. Boots, *supra* note 4.

148. Kalytiak, *supra* note 65.

149. *Id.*

150. *Id.*

151. Feidt, *supra* note 4.

recommendation of the Judge.[152]

The 2016 election saw Justices Bolger and Maassen targeted by social conservatives for a specific decision regarding the ability of minors to access abortion without parental notification.[153] The Judicial Council had recommended both justices for retention, and the Council's executive director questioned whether retention decisions should be based on a single decision rather than the comprehensive evaluation the Council performs.[154] Many in the legal community were quick to come to the justices' defense thereby minimizing their need to defend themselves or campaign.[155] In the end, Justices Bolger and Maassen were both retained with 58% and 57% approval respectively,[156] although that level of support was significantly below Alaska's median statewide retention rate over the previous two decades.[157] Despite the judges' ultimate retention, these elections show judges are increasingly being targeted for their decisions on contentious issues.

The 2018 retention election and opposition against Judge Corey was different than what had come before.[158] Chiefly, neither the positive Judicial Council recommendation nor concerns that a campaign based on a single decision could threaten the judicial system were enough to convince voters to retain Judge Corey.[159] Furthermore, unlike many of the previous anti-retention campaigns, both conservatives and liberals targeted the judge for the same decision.[160] The entire opposition campaign was focused around Judge Corey's decision to approve a no-jail plea deal for a defendant accused of sexual violence,[161] which he approved because he felt it was in line with the law.[162]

152. *Id.*
153. Kitchenman, *supra* note 5.
154. *Id.*
155. *Id.*
156. *Alaska Results*, THE N.Y. TIMES (Aug. 1, 2017, 11:22 AM), https://www.nytimes.com/elections/2016/results/Alaska.
157. The median approval rate for all statewide judicial retention elections in Alaska between 1996 and 2016 was 63.4%. Klumpp, *supra* note 2, at 153. Since that data includes the 2016 elections of Justices Bolger and Maassen, *id.*, the median rate for all *other* statewide judicial retention elections for that time period is higher. *See id.*
158. *See* Rivera, *Preliminary* Numbers, *supra* note 1 (noting that voters had never before voted to remove a judge who was recommended for retention by the Council).
159. *Id.*; Rivera, *Alaskans Rally*, *supra* note 3.
160. *See, e.g.*, Rivera, *Preliminary Numbers*, *supra* note 1; Rivera, *Alaskans Rally*, *supra* note 3; Klumpp, *supra* note 2; *Alaska Results*, *supra* note 156.
161. *Our Story*, NO MORE FREE PASSES (last visited Aug. 31, 2020), https://www.nomorefreepasses.org/mission-index-impact.
162. Rivera, *Preliminary Numbers*, *supra* note 1. That loophole was subsequently closed via the legislature. Kristen Durand, *Alaska House of*

Some opponents of Judge Corey suggested that his non-retention was not actually such an anomalous result because the Judicial Council had completed its recommendations before he approved the plea deal and might have not recommended him after he approved the deal.[163] However, there are reasons to doubt that suggestion. First, the Department of Law concluded the sentence was consistent with state law at the time, which suggests that Judge Corey's decision was a competent one.[164] Second, the Judicial Council does not base its recommendations on single decisions, so it is unlikely this one case would have changed anything.[165]

The ouster of Judge Corey demonstrates the challenges judges face in retention elections. His non-retention highlights how judges often have difficulty responding to the charges leveled against them. Even after his decision, when Judge Corey felt like he could finally respond, he could only speak in generalities which were in line with the ethics rule, saying only that he was aware of the uproar and was obliged to follow the law.[166] Further exacerbating the challenge he faced was that, unlike with Justices Bolger and Maassen in 2016,[167] no one organized in his support.[168] The vote against Judge Corey also reveals one of the avenues for increased politicization of retention election: increasing media focus on specific judicial decisions.[169]

In the end, Judge Corey became the first judge to be "unseated solely by a popular uprising."[170] Troublingly, this result could yield a chilling effect on future decisions.[171] Knowing that unpopular decisions, even those required by law, could cost them their job, judges may bow to pressure and change their decisions.[172] If that happens, it would undermine the very independence that Alaska's Framers wanted to protect.[173] The final Part posits how to avoid that grim possibility.

Representatives passes legislation closing 'Schneider loophole,' KTUU (Apr. 27, 2019, 6:10 PM), https://www.alaskasnewssource.com/content/news/Alaska-House-of-Representatives-passes-legislation-closing-Schneider-loophole-509166031.html.

163. Rivera, *Preliminary Numbers*, *supra* note 1.
164. Rivera, *Alaskans Rally*, *supra* note 3.
165. ALASKA COURT SYS., *supra* note 33.
166. Boots, *supra* note 4.
167. Kitchenman, *supra* note 5.
168. *See* Rivera, *Alaskans Rally*, *supra* note 3 (stating that only one supporter showed up to advocate for Judge Corey's retainment).
169. Fortson & Knudsen, *supra* note 125, at 11.
170. Boots, *supra* note 4.
171. *Id.*
172. Fortson & Knudsen, *supra* note 125, at 9–11; BANNON, *supra* note 32, at 11.
173. PACC, *supra* note 7, at 598 (remarks of Del. Davis).

IV. POTENTIAL SOLUTIONS TO MAINTAIN JUDICIAL INDEPENDENCE IN ALASKA'S MERIT SYSTEM

Alaska's judicial merit system is strong, but it is still vulnerable. This Part examines potential reforms to preserve the independence of Alaska's judiciary. As Justice O'Connor stated, "even states that use a merit-selection system to select judges should scrutinize their plans to preserve what is essential to judicial independence and reform those aspects of the plan that are expendable and might otherwise endanger the whole."[174] Proposed reforms fall into two broad categories: changes to reinforce the existing system, and manners of replacing the existing system. While the decision ultimately falls to the people of Alaska, the most effective solution is the last one offered: replacing the judicial retention mechanism with a system similar to the current appointment process.

A. Changes to Reinforce the Existing System

Short of completely doing away with the current retention system, there are a number of reforms that could help reduce the threat to the independence of Alaska's judiciary. These fixes to the existing system may sit better with Alaskan policy makers and the Alaskan public given that both groups are broadly content with the system as it was originally designed.[175] This section reviews solutions that do not involve removing judicial retention elections.

1. Campaign Finance Reform

Given the impact of *Citizens United*,[176] campaign finance reform would be an important first step to reforming the current system. One possibility could involve a prohibition on fundraising in these elections except in extraordinary situations.[177] This potential solution is reinforced by the impact that raising money has on judicial decisions.[178] However, this solution is fraught with potential risks. First, while it has been suggested as a potential reform,[179] it does not appear that any state has

174. O'Connor, *supra* note 104, at 481. While Justice O'Connor was speaking about the original Missouri Plan, her comments are equally applicable to Alaska's judicial merit system given that it was based on the Missouri Plan. *Id.*; PACC, *supra* note 7, at 584 (remarks of Del. McLaughlin).

175. Boyer, *supra* note 77, at 625.

176. BANNON, *supra* note 32, at 10.

177. O'CONNOR JUDICIAL SELECTION PLAN, *supra* note 76, at 8.

178. *See* BANNON, *supra* note 32, at 4 (explaining that a correlation exists between donations and judges' decisions when they still have a future reelection campaign).

179. O'CONNOR JUDICIAL SELECTION PLAN, *supra* note 76, at 8.

actually completely banned judicial fundraising by all potential people or groups in judicial elections. Second, it is not clear whether such a ban would be constitutional. In *Williams-Yulee v. Florida Bar*,[180] the U.S. Supreme Court recognized that judicial elections can be regulated in different ways because of the different roles judges play in contrast to politicians.[181] While the Supreme Court ruled that a state could prohibit judges from personally soliciting donations,[182] it did not address a total ban on solicitation.[183] Thus, a complete ban on judicial fundraising may not last. Finally, this solution could ultimately do more harm than good by exacerbating the difficulty judges have in responding to attacks. This potential harm is only heightened by the fact that judicial opponents may not need money to attack judges; the successful ouster of Judge Corey was "a popular uprising."[184]

Another campaign finance solution is to enact a public financing system, which a number of scholars and public interest groups have recommended,[185] because it can help ensure the appearance of impartiality by limiting the role of special interest money.[186] With public financing, candidates who receive a certain amount of public support could opt in to a system that would provide all or a majority of their campaign funds from a variety of public sources.[187] The goal of these systems is to ensure that all candidates have the ability to campaign if need be, but do not have to waste time fundraising nor accept funds from individuals who may then appear before them.[188]

However, public financing does not seem to address problems specifically occurring in Alaska. As an initial point, it is typically only a solution in states with competitive elections.[189] Furthermore, it can be very difficult to find funding for such a program.[190] The lack of funding is likely especially an issue in Alaska given the state's recent budget

180. 575 U.S. 433 (2015).
181. *Id.* at 446.
182. *Id.* at 455.
183. *See id.* at 452 (chastising the dissent for saying Florida had to ban all fundraising in the case before simply saying that the state did not have to make an all-or-nothing decision on that front).
184. Boots, *supra* note 4.
185. Dann & Hansen, *supra* note 124, at 1440; BANNON, *supra* note 32, at 5; AM. BAR ASS'N, *supra* note 55, at 14.
186. AM. COLL. OF TRIAL LAWYERS, *supra* note 105, at 1; BANNON, *supra* note 32, at 13.
187. *See generally* DEBORAH GOLDBERG, BRENNAN CTR. FOR JUSTICE, PUBLIC FUNDING OF JUDICIAL ELECTIONS: FINANCING CAMPAIGNS FOR FAIR AND IMPARTIAL COURTS (2002) (detailing possible systems of public financing for elections).
188. *Id.* at 3–4.
189. SARA MATHIAS, ELECTING JUSTICE: A HANDBOOK OF JUDICIAL ELECTION REFORMS 45 (1990).
190. *Id.* at 46.

crises.[191] Finally, public financing is generally unpopular with the public.[192]

2. Means of Defending Judges from Attacks

Solutions that maintain retention elections could also focus on defending judges from politicized attacks.[193] Alaska already made one change in this vein in 1976, when it instituted judicial evaluations to overcome the lack of information voters had about judicial retention candidates.[194] Such evaluations also help to counter biased or politically-motivated "performance reviews" by interest groups.[195] They further mitigate the need for fundraising, especially when they are disseminated by the government, as they are in Alaska.[196] There are a number of additional options that fall within the same spirit as the Judicial Council's evaluations.

One solution in this category would be to have the Judicial Council put out proactive ads for judges they have recommended retaining, in a similar vein to the reactive ad for Judge Tan in 2012.[197] This tact would solve several potential problems. First, it would lessen the impact of last-minute surprise attack ads as voters would have already been exposed to the ads in support of the judge. Second, it would reduce the need for judges to raise money and campaign because they would get a baseline boost from Judicial Council advertisements. Third, it would help judges like Judge Corey who were recommended for retention but who did not have people to help build up their campaign as Justices Bolger and Maassen did.[198] However, this potential solution has similar weaknesses to public financing because it would involve public tax money for the Judicial Council funding for the ads. While a few thousand dollars per candidate does not seem like a significant expenditure,[199] the public may

191. *E.g.*, James Brooks, *Alaska Legislators Expect 'Colossal' Supplemental Spending, Gobbling Last Year's Budget Cuts*, ANCHORAGE DAILY NEWS (Jan. 30, 2020) [hereinafter Brooks, *Alaska Legislators*], https://www.adn.com/politics/alaska-legislature/2020/01/31/alaska-legislators-expect-colossal-supplemental-spending-gobbling-last-years-budget-cuts/.

192. MATHIAS, *supra* note 189, at 46.

193. *See* Dann & Hansen, *supra* note 124, at 1440 (explaining that judges in retention elections must be able to make adequate responses to the charges against them).

194. Andersen, *supra* note 55, at 1375; BANNON, *supra* note 32, at 5; AM. BAR ASS'N, *supra* note 55, at 9.

195. Andersen, *supra* note 55, at 1378.

196. *Id.* at 1379; ALASKA STAT. §§ 15.58.010, .020, .030(g), .050 (2020).

197. Feidt, *supra* note 4.

198. *Compare* the level of support from the legal community in Boots, *supra* note 4, *with* that in Kitchenman, *supra* note 5.

199. *See* Feidt, *supra* note 4 (explaining how much the Judicial Council spent on ads for Judge Tan).

not have the budget appetite given the intense spending cuts of 2019 and difficulties in the 2020 budgeting process.[200]

Another option would be to amend the Alaska Judicial Code of Conduct to allow judges to respond more comprehensively to attacks against them.[201] After one of Tennessee's supreme court justices was not retained in 1996 for her death penalty decisions, the state did just that and allowed judges to respond freely to substantive criticisms and distortions of their records.[202] Alaska could amend its Judicial Code of Conduct to include a similar provision. However, this potential solution has two drawbacks. The solution could be worse than the ill it seeks to cure, because the broader leeway given to judges could politicize the retention races even more.[203] Further, the solution does not appear well-suited to Alaska. Alaska's judges have a deep-seated belief in not publicizing their views on contentious issues that may appear before their courts.[204]

A final potential solution would involve imposing filing deadlines for people seeking to oppose the retention of judges.[205] Not requiring opponents to declare their opposition by a set date incentivizes strategic blitz attacks on judges.[206] These types of attacks are already an issue in Alaska, especially as part of a coordinated campaign.[207] In fact, that very issue arose in Justice Fabe's 2010 retention election when the active opposition kicked off its campaign mere days before the election.[208] Currently, judges must declare their intent to seek retention by August 1,[209] and the Judicial Council recommendations are generally finished by the second half of September.[210] As a result, the deadline for declaring opposition could plausibly be October 1. This would give potential opponents sufficient time to consider whether they plan to declare active

200. Brooks, *Alaska Legislators*, *supra* note 191.
201. MATHIAS, *supra* note 189, at 29.
202. Traciel V. Reid, *The Politicization of Retention Elections,* 83 JUDICATURE 68, 73–74 (1999).
203. *See* MATHIAS, *supra* note 189, at 29 (noting the potential dangers of broadening judicial ethics canons).
204. *See* Alaska Right to Life Political Action Comm. v. Feldman, 504 F.3d 840, 843 (9th Cir. 2007) (where judges simply did not respond substantively to a survey asking them their views on issues from assisted suicide to abortion).
205. *See* Dann & Hansen, *supra* note 124, at 1441 (proposing a filing deadline for retention opposition in general).
206. Reid, *supra* note 202, at 76.
207. Kalytiak, *supra* note 65; *see* Klumpp, *supra* note 2, at 145 (citing Justice Carpeneti from the CLE explaining his concern about coordinated campaigns against judges).
208. Kalytiak, *supra* note 65.
209. ALASKA STAT. §§ 15.35.040, .055, .070, .110 (2020).
210. *See* Rivera, *Preliminary Numbers*, *supra* note 1 (stating the Judicial Council had completed its recommendations before Judge Corey's plea decision); Boots, *supra* note 1 (stating the plea decision came on September 22).

opposition and give those judges facing opposition enough time to organize their response.

This potential solution has possible First Amendment issues and could be difficult to enforce, given the broad definition of active opposition.[211] In order for this solution to be possible, it will likely require the legislature to go back and narrow what conduct would fall within the scope of that term. Still, especially in the context of coordinated anti-retention campaigns such as the one faced by Justice Fabe, this solution could provide benefits and avoid the enforcement difficulties involved with less organized opposition such as a series of social media posts by loosely affiliated individuals. However, a detailed discussion of these possible First Amendment issues and solutions is beyond the scope of this Note and the expertise of this author.

3. Increasing Voter Education and Information

The last potential solution that maintains judicial retention elections focuses on increasing the amount and efficacy of information voters receive. This solution would involve updating Alaska's pre-existing state government civic education curriculum for secondary school students. The new curriculum could include a section on the importance of the judiciary following the rule of law and protecting the rights of the unpopular. It could also contain a discussion of the role of retention elections in Alaska's judicial merit system and how they are not meant as a means of throwing out judges for decisions with which a person disagrees. Reforming civics education is a common recommendation for improving judicial elections in general.[212] It is also recommended in other states where the public is skeptical of judicial retention processes that aim to foster judicial independence.[213] If done properly, such civics education can help develop a consensus of restraint around non-retention of judges.[214]

Further, this potential solution may be particularly fitting for Alaska. For one, it could help address the longstanding skepticism that Alaskans have towards the legal system.[215] Second, the Judicial Council already

211. ALASKA CODE OF JUDICIAL CONDUCT CANON 5C(2) Commentary (1998).

212. AM. COLL. OF TRIAL LAWYERS, *supra* note 105, at 4; O'Connor, *supra* note 104, at 492–93.

213. AM. JUDICATURE SOC'Y, JUDICIAL INDEPENDENCE AND ACCOUNTABILITY IN HAWAII 1, 3, 5–6 (2008), http://americanjudicaturesociety.org/wp-content/uploads/2017/09/ATTACHMENT-9.pdf.

214. *See* Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 SOUTHERN CAL. L. REV. 1969, 1983 (1988) (urging professionals in a position to influence the public to lobby the public towards constraint in judicial elections).

215. Klumpp, *supra* note 2, at 159.

undertakes civics-style education through official statements. As an example, the Judicial Council's official online Frequently Asked Questions section explains: "You do a public service to your fellow citizens by voting to retain judges who perform well and voting not to retain a judge who does not meet expectations."[216] Similarly, the Judicial Council's executive director is often quoted explaining how voters should look at judges' entire body of work rather than just a single decision.[217] This solution does involve two potential drawbacks. One, the overall effectiveness of such a civic education campaign is unclear. Second, even if it is effective, it is not clear how soon civics education would impact the judicial retention elections; it is possible that the state cannot afford to wait.

B. Removing Judicial Retention Elections

While reforms to the current system may be the more politically expedient solution, they will likely be insufficient to fully counteract the rising threat to judicial independence in Alaska. Although the system is, for the time being, largely still functioning as it was intended, the current trend in the politicization of retention elections indicates that it is unlikely to continue doing so. Some public interest groups have recommended ending retention elections altogether.[218] This is partially premised on refuting the false choice between accountability with elections and independence without elections.[219] Instead, it emphasizes that states have accountability safeguards other than retention elections.[220] After

216. ALASKA JUDICIAL COUNCIL, *supra* note 56. The same FAQ warns against politicizing the retention process:

> Sometimes judges are asked to resolve contentious or divisive disputes involving social issues. As in all cases, a judge must do his or her best to fairly and impartially apply the law, even if it requires the judge to issue a decision that is unpopular, or which conflicts with the judge's personal beliefs. . . . [E]fforts [to unseat a judge for political or ideological reasons] may be aimed at affecting future decisions of other judges. [E]fforts to unseat a judge [for political reasons] diminish the neutrality and impartiality of our judiciary.

Id.

217. *E.g.*, Matt Miller, *Why Alaska Judges Don't Raise Campaign Funds to Continue to Serve, Like Other States'*, ALASKA PUB. MED. (Nov. 7, 2016), https://www.alaskapublic.org/2016/11/07/why-alaska-judges-dont-raise-campaign-funds-to-continue-to-serve-like-other-states/.

218. *See, e.g.*, BANNON, *supra* note 32, at 10 ("Even as part of a merit selection system, we recommend against judicial retention elections.").

219. *See* O'Connor, *supra* note 104, at 483 (characterizing the "choice between an independent and an accountable judiciary" as "false").

220. *See* BANNON, *supra* note 32, at 10 (listing safeguards other than retention elections).

discussing the other safeguards Alaska will still have if it eliminates judicial retention elections, this Section will discuss the options for replacing such elections. First, it will discuss the possibility of a long single term for judges and explain why that solution may not fit with Alaska. Then, it will turn to considering a replacement for the current retention mechanism, ultimately arguing that making the current retention recommendations binding best balances the needs of judicial independence and accountability.

1. Continued Judicial Accountability Safeguards with a New Retention Mechanism

While elections are one form of accountability, other means exist to protect that value even if Alaska enacts these alternatives to retention elections. One such safeguard is the nomination process itself.[221] Given the strong reputation of Alaska's judges and the high rate of retention throughout the system's history, it is clear that the initial nomination process is producing judicial candidates worthy of their position.[222] Further, the public already has significant input in the nominating process, including via their election of the governor, so the loss of one democratic check is minimized.[223]

A number of safeguards beyond retention elections also exist once judges are on the bench. As with any judiciary, statutory and constitutional limits constrain judicial discretion.[224] Both trial judges and lower-level appellate judges are subject to the appellate review process. In Alaska specifically, the Commission on Judicial Conduct can also recommend sanctions, including suspension or removal, for the Alaska Supreme Court to apply.[225] Finally, judges can be impeached for malfeasance or misfeasance.[226] Given these safeguards, Alaska could end judicial retention elections without sacrificing significant accountability

221. Grodin, *supra* note 214, at 1983; BANNON, *supra* note 32, at 10.

222. *See* Carpeneti & Frazer, *supra* note 10, at 233; *see* Carns & Dosik, *supra* note 6, at 202 (explaining that only five judges were not retained before Judge Corey was not retained).

223. Carns & Dosik, *supra* note 6, at 198; Carpeneti & Frazer, *supra* note 10, at 207.

224. BANNON, *supra* note 32, at 5; *see* AM. JUDICATURE SOC'Y, *supra* note 213, at 1 (describing other safeguards in Hawaii's system, which uses the equivalent of judicial council recommendation for retention).

225. ALASKA CONST. art. IV, § 10 ("In addition to being subject to impeachment under Section 12 of this article, a justice or judge may be disqualified from acting as such and may be suspended, removed from office, retired, or censured by the supreme court upon the recommendation of the commission. The powers and duties of the commission and the bases for judicial disqualification shall be established by law.").

226. ALASKA CONST. art. IV, § 12.

within the system.

Recognizing the potentially significant nature of this change, a possible way to mitigate risks from such a shift could be to make changes to the non-constitutional, statutory courts first.[227] Only the Alaska Supreme Court and superior courts are created by the Constitution.[228] The court of appeals and district courts are both created by statute.[229] Thus, to change the retention mechanism for the Supreme and superior courts requires using the constitutional amendment process, requiring a two-thirds vote by each house of the legislature and then a majority vote by the public in favor of the amendment.[230] By contrast, the court of appeals and district courts can have their retention mechanism changed by a majority vote in each house.[231]

Due to the greater difficulty of changing the retention process for the Supreme Court and superior courts, any change in the retention mechanism could be first made to the court of appeals and district courts. Especially given that the district courts have retention elections every four years,[232] this would allow the state to judge the new retention process. Assuming the new system works, these positive experiences with the court of appeals and district courts would provide greater incentive and support to push for a constitutional amendment to change the process for the Supreme Court and superior courts. If the system did not work or if the people of Alaska decided they still preferred the old system of retention elections, they could revert to the old system with legislation alone because the constitutionally created courts would not have been changed yet. The difference between statutory and constitutional courts could be leveraged to test the new retention mechanism in a way that is easier to implement and then easier to change back if necessary. The question then becomes how to determine judicial terms in the absence of retention elections.

2. Single Terms

The first potential option is to have all judges serve a single term. Judges could have lifetime tenure during good behavior, similar to the federal judiciary.[233] However, life tenure is likely to face stiff pushback

227. Since the court of appeals and district courts are controlled by statute, they can be changed through normal legislation rather than by constitutional amendment. ALASKA CONST. art. IV §§ 2–3; ALASKA STAT. § 22.07.010 (2020).

228. ALASKA CONST. art. IV, §§ 2–3.

229. ALASKA STAT. ANN. §§ 22.07.010, .15.010 (2020).

230. ALASKA CONST. art. XIII, § 1.

231. *See* ALASKA CONST. art. II, § 14 (requiring majority support in each house for a bill to become law).

232. ALASKA STAT. ANN. § 15.15.030(10) (2020).

233. BANNON, *supra* note 32, at 11.

given that Alaska's Framers explicitly rejected it out of concerns that judges would be completely unresponsive to the will of the people and would not change with the times.[234]

Alternatively, judges could serve a single, lengthy term such that they are on the bench for a set period of time but free from the influence of potential future elections.[235] Many recommendations in this vein set the term between fourteen and eighteen years with staggered terms on multi-member courts.[236] U.S. Supreme Court Justices believe it can take years to fully understand the job, and this system has the benefit of allowing for that learning.[237] The job security of the position also helps to attract high quality applicants.[238] Further, this method ensures the bench reflects evolving community values by creating consistent turnover.[239]

However, as with some prior potential solutions, this does not seem to be particular fitting for Alaska. First, Alaska's current system already has high quality judges, so the supposed added benefits of this system of attracting higher quality judges would be minimal to non-existent.[240] Second, some of the other benefits, such as lowering the stakes of a vacancy, do not really make sense in light of the insulation from political stakes that the selection process already engenders.[241] Finally, this change would potentially force judges off the bench while they still could admirably continue to serve the people of Alaska. Alaska has had a number of high-quality, long-serving jurists.[242] As already noted, it can take judges years to completely learn the job, and this solution would continuously remove experienced and competent judges.[243]

3. Replacing the Retention Mechanism

To avoid a situation where competent judges are removed due to an arbitrary term limit, Alaska could implement a hybrid retention system.

234. *See* PACC, *supra* note 7, at 598 (remarks of Del. Davis) ("Any attorney who has practiced law has seen instances where a judge appointed for a lifetime, after serving for a length of time, becomes completely unresponsive to the will of the people, refuses to change with the times and the times do change.").

235. BANNON, *supra* note 32, at 1; Grodin, *supra* note 214, at 1983.

236. *E.g.* BANNON, *supra* note 32, at 11, 15.

237. *Id.* at 12.

238. *Id.*

239. *Id.*

240. Carpeneti & Frazer, *supra* note 10, at 233.

241. BANNON, *supra* note 32, at 12; *see* PACC, *supra* note 7, at 599 (remarks of Del. Davis) (describing how, unlike where judges are appointed for short terms, the Alaska system would "keep judges free from outside pressures.").

242. *See generally, e.g.*, Susan Orlansky & Jeffrey M. Feldman, *Justice Rabinowitz and Personal Freedom: Evolving a Constitutional Framework*, 15 ALASKA L. REV. 1, 1 (1998) (praising Chief Justice Rabinowitz's seminal decisions protecting individual constitutional rights in Alaska over decades).

243. BANNON, *supra* note 32, at 12.

Rather than putting judicial retention to the electorate, an independent body such as the Judicial Council could make the final decision on retention.[244] While this proposed solution would remove an opportunity for public participation via voting, the current system for appointments through the Judicial Council already includes significant public input and relies on many of the other safeguards within the system.[245] This solution is the best way to balance the competing interests of judicial accountability and independence. It increases judicial independence by removing the growing threat of the politicization of retention elections. It maintains accountability in the system because it provides a way other than elections to remove poorly performing judges.[246] Ultimately, this solution is best suited to provide the proper balance between accountability and independence.

Switching to a complete reliance on the Judicial Council's recommendations is feasible because both judges and voters in Alaska broadly believe the current recommendation system is working well. In surveys, 66.7% of judges in Alaska agree or strongly agree that the overall process to collect information for the recommendations is fair.[247] Only 22.9% of judges think that the Judicial Council's evaluations undermine their independence.[248] Given this low number, the threat to independence from the Judicial Council is likely lower than the threat posed by increasingly contentious retention elections. Further, voters broadly follow the recommendations of the Judicial Council. Voters have only acted counter to the Judicial Council's recommendation four times in Alaska's history since 1982.[249] A study looking at every retention election

244. BANNON, *supra* note 32, at 2, 11; ALASKA STAT. § 15.58.020 (2020).

245. ALASKA COURT SYS., *supra* note 33; ALASKA JUDICIAL COUNCIL, *supra* note 56.

246. BANNON, *supra* note 32, at 12.

247. Andersen, *supra* note 55, at 1387.

248. *Id.*

249. One is obviously Judge Corey. Rivera, *Preliminary Numbers*, *supra* note 1. In addition, voters have retained three of seven judges whom the Judicial Council had recommended against retaining between 1982 and 2014. Fortson & Knudsen, *supra* note 125, at 9. Between 1976—when the Judicial Council first started making recommendations—and 1982, the Judicial Council recommended against retention multiple times, but the judges were all retained. TERESA WHITE CARNS, LARRY COHN & SUSAN MCKELVIE, SELECTION AND EVALUATING ALASKA'S JUDGES: 1984–2012 43 n.85 (2013), https://ajc.alaska.gov/publications/docs/research/SelectingEvaluatingAKJudges1984-2012%20(July%202013).pdf. These breaks with the Judicial Council's recommendations could reflect the relative novelty of the recommendation procedure to both the Council and voters. The Judicial Council itself even suggested that possibility in a report to Alaska's Legislature and Supreme Court. *See* ALASKA JUDICIAL COUNCIL, SIXTEENTH REPORT TO THE LEGISLATURE AND SUPREME COURT: 1991–1992 F-5–6 (1993),

in Alaska between 1976 and 1996 found a positive correlation between ratings and retention votes.[250] The study also found that voters were even more persuaded by negative recommendations than by positive ones.[251] All of this suggests that either voters trust the Judicial Council or find its recommendation persuasive enough to follow—even if that is due to the Judicial Council's informational advantages.[252] Thus, it is likely that voters would broadly trust a system in which the Judicial Council's recommendations became a binding decision on whether or not to retain a judge.

Hawaii already uses this system, so it is possible to look at its experience for insight about this change as well.[253] In many ways, it makes sense that Hawaii has a very similar system. Like Alaska, it was one of the last states to be admitted to the Union, so it could also draw on experiences of all the other states.[254] The comparison is also a fitting one for other reasons. First, Alaska's Framers looked to Hawaii as a good source on independence in the judiciary.[255] Second, Hawaii's process for deciding whether to retain judges is very similar to the Judicial Council's process to decide whether to recommend retention, which this solution

https://www.ncjrs.gov/pdffiles1/Digitization/141097NCJRS.pdf (explaining the differences between the 1982 election and earlier elections "included increasing reliance on Judicial Council recommendations as voters grew more familiar with them"). That possibility is bolstered by the fact that the Judicial Council updated over time its methods for evaluating judges when making retention recommendations. *See* ESTERLING & SAMPSON, *supra* note 30, at 76, 80–81 (detailing changes in the Judicial Council's information gathering for retention recommendations). Furthermore, the Judicial Council itself has not evaluated retention elections before 1984 in its official publications. *See* Alaska Judicial Council, PUBLICATIONS (last visited Aug. 19, 2020), http://www.ajc.state.ak.us/publications/index.html#research (including only reports on retention elections that start with 1984 at the earliest). Finally, the judges ranked as unqualified in pre-1982 elections either resigned or were defeated after a second recommendation against retention. Brian S. Akre, *Alaska Voters Consider Fate of 'Unqualified' Judge*, AP (Nov. 5, 1988), https://apnews.com/16c33988fb33447c26799d12ff57b934. The year 1982 thus represents a reasonable starting point, and this Note will only examine in depth times when voters contravened the Judicial Council's recommendation starting in 1982.

250. ESTERLING & SAMPSON, *supra* note 30, at 70. Because this study covers the years 1976 to 1982, it also accounts for the times when voters acted counter to the Council's recommendations in those elections. *Id.*

251. *Id.*

252. Fortson & Knudsen, *supra* note 125, at 9; ESTERLING & SAMPSON, *supra* note 30, at 70.

253. BANNON, *supra* note 32, at 2.

254. Boyer, *supra* note 77, at 609.

255. *See* PACC, *supra* note 7, at 596 (remarks of Del. V. Rivers) (citing the Hawaiian Legislative Handbook when discussing judicial independence).

would use as the new retention mechanism.[256] Overall, Hawaii's system has been working well with the main issue being a greater need for improved civics education to help the public better understand how it operates[257]—an issue Alaska must also confront.[258] Thus, Hawaii provides further evidence that Alaska would fare well switching to a system in which the Judicial Council controlled retention through its current recommendation process.

The switch to retention solely via the Judicial Council does have potential drawbacks. First, this system would increase the influence of the Judicial Council. Opponents of the current system have already indicated they believe lawyers have too much influence in the process.[259] However, the Alaskan legislature has repeatedly rejected attempts to diminish the power of lawyers within the Judicial Council.[260] Legally-trained members of the Judicial Council are prioritized in the initial nomination process because they have more familiarity with the subject matter and potential judges.[261] That familiarity carries over to the retention recommendation as well.[262] Finally, just as with the initial nomination process, the three lay members of the Judicial Council provide balance.[263] Therefore, concerns about outsized influence for attorneys under such a system are unfounded. While it is possible the Judicial Council as a whole could become out of touch with the people of Alaska, that issue could be corrected by the Bar and the governor when the six-year terms of the Council members are up.[264] Further, the arguments against the Judicial Council have never expressed a concern that the whole Council, rather than just the attorneys, was out of touch with the people of Alaska.

But what about the four times that the voters have gone against the Judicial Council since 1982?[265] Judge Corey is an easy case because his non-retention was the very catalyst for exploring this change given the damage to judicial independence it could have.[266] However, the three judges who voters retained, despite negative recommendations, are more difficult. Still, upon closer examination, the non-retention of those judges

256. *Compare* AM. JUDICATURE SOC'Y, *supra* note 213, at 9–11, *with* ALASKA JUDICIAL COUNCIL, *supra* note 56.
257. AM. JUDICATURE SOC'Y, *supra* note 213, at 12.
258. *See supra* Part IIIA3.
259. Carpeneti & Frazer, *supra* note 10, at 226.
260. *Id.*
261. Boyer, *supra* note 77, at 618.
262. *Id.*
263. *Id.*
264. ALASKA CONST. art. IV, § 8.
265. For an explanation of why this Note only looks at breaks with the Judicial Council's recommendation since 1982 *see supra* note 249 and accompanying text.
266. *See supra* Part IIB.

would have been acceptable and even better despite going against the public sentiment. Two of the three had already committed judicial misconduct leading to the no-retention recommendation, two of the three would commit judicial misconduct after being retained, and two of the three were retained due to campaigns that, at least in part, politicized the judiciary.

The first judge that was retained despite negative recommendations, Judge Karl Johnstone in 1988, was only retained after a politically-charged group pushed for his retention.[267] The Judicial Council recommended against retaining Johnstone because he "scored poorly in integrity, judicial temperament, and overall performance" as ranked by fellow lawyers and judges.[268] While some people were concerned that the surveys of Johnstone could have been skewed by attorneys seeking revenge, that criticism is undercut by the fact that over five hundred lawyers and judges were surveyed, making it doubtful that revenge motivated a significant portion of the group.[269] Furthermore, to the extent such concern about potential bias by losing parties was valid, the Judicial Council has since expanded the basis for input to include the public writ large. This expansion makes it extremely unlikely that a disgruntled minority could bias the recommendation process now.[270] Finally, the Judicial Council was later vindicated in its concern that Johnstone did not have the necessary integrity to be a judge; twelve years after the Council recommended against retaining him, Johnstone was publicly reprimanded by the Alaska Supreme Court for creating the appearance of impropriety by hiring the coroner in his judicial district.[271]

Johnstone was ultimately retained following a campaign led by a victims' rights group, which Johnstone highlighted in arguing for his own retention.[272] The victims' rights movement represents the same marriage

267. *See* Sheila Toomey, *Election 1988 Voters Lean Toward Retaining All 17 Judges Despite Disputes*, ANCHORAGE DAILY NEWS, Nov. 9, 1988, at D1 [hereinafter Toomey, *Election 1988 Voters*], infoweb.newsbank.com/apps/news/document-view?p=AMNEWS&docref=news/0F78DD5B6A9692E4 ("To counter the council's recommendation against his retention, Johnstone's supporters, which include a local victims' rights group, mounted a lowkeyed campaign of letters to the editor, a few newspaper ads last week and at least one mailing, all of which praised him as fair and firm and recommended he be kept on the bench.").

268. Akre, *supra* note 249.

269. *Id.*

270. *See* ESTERLING & SAMPSON, *supra* note 30, at 76, 80 (describing measures the Judicial Council took to increase public input in the 1990s).

271. In re Johnstone, 2 P.3d 1226, 1228, 1238 (Alaska 2000) (upholding the Alaska Commission on Judicial Conduct's public reprimand and then stating the opinion would count as the public reprimand).

272. Toomey, *Election 1988*, *supra* note 267; Sheila Toomey, *Election 1988 Judge's Integrity Comes Under Question As Election Issue*, ANCHORAGE DAILY NEWS, Oct. 30, 1988, at K1, infoweb.newsbank.com/apps/news/document-

of right and left that succeeded in motivating Judge Corey's ouster thirty years after Johnstone's.[273] The judicial merit system is designed to insulate judges from such political influence, so the fact that Johnstone's retention would have been avoided through a system solely based on the Judicial Council's recommendations is a boon rather than a drawback. Thus, Johnstone's retention against the recommendation of the Judicial Council is further reason to support changing to a system in which the Council's recommendation becomes a binding decision on whether or not to retain a judge.

The second judge retained despite a negative recommendation, Judge Dennis Cummings whose negative recommendation occurred in 2008, was removed from the bench in 2013 by the Alaska Supreme Court for a similar misconduct issue that led to the Judicial Council's initial recommendation against his retention.[274] The Judicial Council recommended against retaining Cummings for improper ex parte communication and low ratings from fellow jurists on legal ability and temperament.[275] It is not clear why voters chose to retain him because there were no reports of pro-retention efforts. Nevertheless, the Alaska Supreme Court's decision to uphold a recommendation of removal from office for the same issue flagged by the Judicial Council vindicates the Judicial Council's recommendation of non-retention for Cummings.[276] Under a system in which the Judicial Council's recommendation was binding, the Commission on Judicial Conduct and the Alaska Supreme Court would have not had to use additional resources to remove Cummings from office for misconduct similar to that which concerned the Judicial Council. The Cummings example only provides further reason to support a change to a system in which the Council's recommendation is binding.

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view?p=AMNEWS&docref=news/0F78DD64E4DC3ED6.

273. *See* Jill Lepore, *The Rise of the Victims'-Rights Movement*, THE NEW YORKER (May 14, 2018), https://www.newyorker.com/magazine/2018/05/21/the-rise-of-the-victims-rights-movement (recounting the influence of both the right-wing tough on crime movement and the liberal feminist movement in the rise of the modern victims' rights movement).

274. *See* Lisa Demer, *Bethel Judge Defends Himself Against Misconduct Charge*, ANCHORAGE DAILY NEWS (Nov. 17, 2008), https://www.adn.com/alaska-news/article/bethel-judge-defends-himself-against-misconduct-charge/2008/11/18/ (detailing Cummings's retention despite a no-retention recommendation based on an ethics complaint for improper ex parte communication); In re Cummings, 292 P.3d 187, 191 (Alaska 2013) (explaining that Cummings was removed from judicial office for improper ex parte communication in part because it was a second offense).

275. ALASKA JUDICIAL COUNCIL, 2008 JUDICIAL RETENTION PERFORMANCE EVALUATION MATERIALS JUDGE DENNIS P. CUMMINGS BETHEL DISTRICT COURT 2 (2008), http://www.ajc.state.ak.us/retention/retent08/cummings08.pdf.

276. *Cummings*, 292 P.3d at 191.

The final case in which voters retained a judge given a non-retention recommendation from the Judicial Council, Judge William Estelle in 2014, involved a pro-retention campaign supported in part by a small group who oppose the Judicial Council in general.[277] The Judicial Council recommended against retaining Estelle because he filed sixteen false affidavits incorrectly certifying he completed matters pending before him in the statutorily-allotted time.[278] For that transgression, the Commission on Judicial Conduct suspended Estelle for 45 days, after finding his error was reckless but unintentional, and the Alaska Supreme Court upheld that punishment.[279] As an initial matter, the Judicial Council performed its task and decided to recommend against retention because Estelle had, albeit unintentionally, committed an act that called his integrity into question not once but sixteen times. Such a lack of integrity can certainly disqualify a judge in a merit-based system, especially considering all judges and even attorneys know about the rule that judges must follow to truthfully sign such affidavits.[280]

Further, while many people supported Estelle because they had known him their whole lives and thought he had integrity,[281] some support came from those who believed the Judicial Council was "worthless" and "incompetent"[282] or who believed that the Judicial Council was merely "politicking" and that a "Legislative wing-clipping" of the Council's advertising budget had failed to accomplish its goal.[283] Much of this resistance to the recommendation was based not on Estelle's merit but on a critique of the system generally. As with the previous examples, the Judicial Council's no-retention recommendation for Estelle was justified by judicial misconduct, and the campaign for retention was,

277. James Brooks, *Meet the Judges on the Ballot in Southeast Alaska*, JUNEAU EMPIRE (Sept. 19, 2018), https://www.juneauempire.com/news/meet-the-judges-on-the-ballot-in-southeast-alaska/; *see* Stuart Thompson, *Judge Estelle is Being Used as a Scapegoat*, MAT-SU VALLEY FRONTIERSMAN, June 16, 2014, at Section 16, infoweb.newsbank.com/apps/news/document-view?p=AMNEWS&docref=news/14E81207EB59D6E0 (declaring the non-retention recommendation "is glaring and gross proof that [the Judicial Council's] recommendations are worthless, and that its members are arguably incompetent at executing their constitutional duties").

278. Lockyer, *supra* note 9.

279. In re Estelle, 336 P.3d 692, 693, 696–97 (Alaska 2014).

280. *Id.* at 697.

281. *E.g.*, *Supports Estelle*, MAT-SU VALLEY FRONTIERSMAN, Oct. 30, 2014, at Opinions Section, infoweb.newsbank.com/apps/news/document-view?p=AMNEWS&docref=news/1515395B5BEA5CC0.

282. Thompson, *supra* note 277.

283. Lynne Gallant, *DiPietro Omits Positive Information about Judge Estelle*, MAT-SU VALLEY FRONTIERSMAN, Nov. 1, 2014, at Opinions Section, infoweb.newsbank.com/apps/news/document-view?p=AMNEWS&docref=news/15158920E0D37910.

in part, based on political backlash that threatened to undermine judicial independence.

Reviewing the three times since 1982 that voters have contradicted the Judicial Council, none represent situations that should be emulated. All three times, the judges either were ranked poorly in judicial qualities or had been accused of misconduct, the very qualities the judicial merit system is designed to exclude. Additionally, for the two pro-retention campaigns on which information was available, some of the push to retain the judges was motivated by social or political movements, which again runs counter to the design of the judicial merit system by undermining judicial independence. If retentions motivated by factors other than the quality of the judge in question are the main loss of switching to a system in which the Judicial Council or another similar independent body makes retention decisions, then the change would be a positive one.

Additionally, this new retention mechanism maintains public input while increasing independence. In order to protect against continued threats to the independence of Alaska's judiciary, the state would be well-served by switching to this updated retention mechanism. As stated before, such a change could first be tested in the non-constitutional courts (the district courts and court of appeals).

V. CONCLUSION

Sixty-five years ago, at Alaska's constitutional convention, the Framers of Alaska designed a judicial merit system to select and retain competent judges in a way that maintained judicial independence while still preserving a degree of accountability. Subsequent history has shown that Alaska has one of the best systems in the country. However, as judicial elections, including retention elections, become increasingly vulnerable to politicization that undermines judicial independence around the country, Alaska has seen signs that its system may be vulnerable to those same corrupting influences. Given that Alaska already has a lower baseline median approval rating for judges in retention elections, its judges are more vulnerable to non-retention and could be easier targets for the type of targeted voting that undermines judicial independence.[284] Maintaining independence is a good thing for rule of law, and more independence in selection and *retention* can actually increase the policy congruence of judges and the average citizen.[285]

284. Klumpp, *supra* note 2, at 155–56.
285. Fortson & Knudsen, *supra* note 125, at 11–12.

The increasing politicization of the judiciary is a threat to the ideals set forth by the Framers. Alaska must respond proactively to preserve this balance for generations to come. The solutions proposed in this Note seek to protect judicial independence while still maintaining accountability in the system. Campaign finance reform for retention elections, expanding the means of defending judges from attacks, and greater voter education could help while still preserving judicial retention elections. However, a new retention mechanism is still the best way to both protect independence and maintain accountability. The last solution—relying on the Judicial Council alone as a retention mechanism—best balances the dual goals of judicial independence and accountability. Still, the choice among these potential solutions must ultimately be made by the people of Alaska and the legal community that serves them.