
REPLY

ALASKA'S MERIT SELECTION FOR JUDGES

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I. INTRODUCTION

In its June 2003 issue, the *Alaska Law Review* published a note entitled "Judicial Selection in Alaska: Justifications and Proposed Courses of Reform."¹ In the article, the author, Tillman Finley, outlined the historical debate about judicial selection systems and briefly reviewed Alaska's merit selection system before suggesting that the judicial selection debate continues to brew in Alaska.² He assessed the arguments for and against merit selection and proposed reforms to address problems he perceived with Alaska's constitutional system.³ That article prompted this reply.

The Finley article contains numerous instances of inaccurate information and proposed reforms that, for the most part, are already in place, many for over forty years. This reply identifies and corrects the errors in that article, critically assesses its discussion of Alaska's merit selection process, and analyzes its proposed reforms. This response concludes that most of the article's suggestions are already in place or would not help reach Mr. Finley's stated goal of an accountable judiciary.

II. THE JUDICIAL SELECTION DEBATE IN ALASKA

The Finley article begins with a review of the historical underpinnings of the debate between merit selection and popular election of

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1. Tillman J. Finley, Note, *Judicial Selection in Alaska: Justifications and Proposed Courses of Reform*, 20 ALASKA L. REV. 49 (2003).

2. *Id.* at 50.

3. *Id.*

judges.⁴ It follows with a discussion of Alaska's merit system and perceived dissent over the judicial selection process in Alaska.⁵ The author suggested that many Alaskans criticize the current system, and called for increased accountability.⁶ He referred to advocates of increased accountability who point to cases exemplifying an "overly active judiciary."⁷ Mr. Finley also stated that there is a "growing suspicion and distrust of Alaska's courts."⁸ As the following discussion will show, the author greatly exaggerated the degree of dissent in Alaska.

At the outset, this reply will help set the record straight concerning some basic errors in the Finley article. For example, it states that "Alaska weighed these [judicial selection] issues on the eve of statehood in 1956,"⁹ and "Alaska incorporated its method of judicial selection into its constitution upon statehood in 1956,"¹⁰ suggesting that Alaska became a state in 1956. Alaska became a state in 1959.¹¹ The author may have contemplated Alaska's Constitutional Convention, which occurred from Nov. 8, 1955 to Feb. 6, 1956.¹²

Another point to clarify is the article's statement that "many Alaskans believe that the state's system of judicial selection does not allow for enough public input, either through contested judicial elections or legislative confirmation of appointed judges."¹³ To support this proposition he cited the "Sponsor Statement" of Senate Joint Resolution 22 (SJR 22), dated April 4, 2001, proposed by former Alaska State Senator Robin Taylor.¹⁴ Former State Senator Taylor made no such assertion in his Sponsor Statement.¹⁵ Instead, through SJR 22, he proposed to change the length of judicial terms for retention elections of supreme

4. *Id.*

5. *Id.* at 52–55.

6. *Id.* at 54.

7. *Id.*

8. *Id.* at 55.

9. *Id.* at 49 (emphasis added).

10. *Id.* at 52 (emphasis added).

11. Exec. Proclamation No. 3269, 3 C.F.R. 4 (1959-1963), reprinted in 48 U.S.C. preceding § 21 (2000).

12. Proceedings of the Alaska Constitutional Convention (Nov. 8, 1955 – Feb. 6, 1956), available at http://www.law.state.ak.us/doclibrary/cc_minutes.html (last visited Sept. 29, 2004).

13. Finley, *supra* note 1, at 54.

14. *Id.* at 54 n. 34 (citing Senator Robin Taylor, Sponsor Statement for S.J. Res. 22, Apr. 4, 2001, available at <http://www.akrepublicans.org/pastlegs/22ndleg/spst/spstsjr022.shtml> (last visited Sept. 2, 2004)).

15. Senator Robin Taylor, Sponsor Statement for S.J. Res. 22, Apr. 4, 2001, available at <http://www.akrepublicans.org/pastlegs/22ndleg/spst/spstsjr022.shtml> (last visited Sept. 2, 2004) (advocating for more accountability of judges by having retention elections more frequently).

court justices and superior court judges.¹⁶ Nothing in either the Sponsor Statement nor the resolution proposed contested judicial elections or legislative confirmation of judges.¹⁷

The author also asserted that “[a]dvocates of increased accountability for Alaska’s judges cite a number of cases as examples of an overly active judiciary.”¹⁸ He did not identify these advocates and cited only two cases:¹⁹ *Area G. Home & Landowners Organization, Inc., v. City of Anchorage (HALO)*²⁰ and *Bess v. Ulmer*.²¹

The author characterized *HALO* as a case in which “the Alaska Supreme Court interpreted a provision of Anchorage’s municipal charter so as to allow the city residents to vote on whether to expand its police service area to include a new community (and impose accompanying municipal taxes) without affording the residents of the area a separate vote on the annexation.”²² Actually, in *HALO*, the city assembly, a body containing duly elected representatives of the people, had enacted an ordinance allowing the city to expand the police service area by abolishing the old one and establishing a new municipal service area that included the disputed area.²³ The court interpreted language in the city charter broadly to permit the assembly’s ordinance and deferred to the assembly’s legislative action to resolve the inequities of having the “new community,” which was actually a well-established neighborhood of the city, that benefited from police and other services without having to pay for them.²⁴ The *HALO* court acted conservatively to uphold the peoples’ and their elected representatives’ votes. It was not a case in which the judiciary could be legitimately characterized as “overly active.”²⁵

The author next described *Bess v. Ulmer* as a case in which the court “rejected a ballot initiative limiting prisoners’ rights as an inappropriate constitutional ‘revision’ and deleted portions of a ballot initiative

16. S.J. Res. 22, 22d Leg., 1st Sess. (Alaska 2001).

17. See Sponsor Statement of Senator Robin Taylor, *supra* note 15; S.J. Res. 22, *supra* note 16.

18. Finley, *supra* note 1, at 54.

19. *Id.*

20. 927 P.2d 728 (Alaska 1996).

21. 985 P.2d 979 (Alaska 1999).

22. Finley, *supra* note 1, at 54.

23. *HALO*, 927 P.2d 728 at 729–30.

24. See *id.* at 732–34.

25. Mr. Finley also cites the *HALO* opinion (a 4-1 opinion) as a reason that then-Chief Justice Fabe was targeted for a negative retention election campaign in 2000. Finley, *supra* note 1, at 66 n.110. The source for this information is a single letter to the editor of the Anchorage Daily News. *Id.* (citing Ruth Ewig, Letter to the Editor, “No” on Fabe, ANCHORAGE DAILY NEWS, Nov 4, 2000, at 98; also citing Ann Lohrey, Letter to the Editor, *Get Fabe Off the Bench*, ANCHORAGE DAILY NEWS, Oct. 16, 2000, at 6B).

amending the Alaska Constitution to prevent the state from recognizing same-sex marriages.”²⁶ He then stated that “[c]ritics often cite these cases and others as evidence of the unresponsive nature of the Alaska judiciary and the dire need for holding judges accountable for their decisions on the bench.”²⁷

In *Bess v. Ulmer*, the Alaska Supreme Court reviewed three ballot initiatives to change or clarify the Alaska Constitution: one altering the constitutional rights of prisoners, one limiting marriage, and one regarding apportionment.²⁸ The court struck down the prisoners’ rights initiative as amounting to an impermissible constitutional revision.²⁹ The court allowed the marriage amendment on the ballot because it was sufficiently limited in its scope.³⁰ The court did, however, strike one sentence of the ballot language as superfluous.³¹ The court also upheld the apportionment initiative.³²

Former State Senator Donley responded to the court’s rulings by introducing Senate Joint Resolution 27 (May 14, 1999), a constitutional amendment that would have prevented the court from “rewriting” a ballot initiative.³³ That amendment failed.³⁴ Former State Senators Donley and Leman also introduced Senate Joint Resolution 15 (SJR 15) in 1999 in response to *Bess v. Ulmer*.³⁵ In SJR 15, the senators proposed to change the Alaska Constitution to allow more frequent judicial retention elections and to give the governor direct power to appoint judges.³⁶ The proposed process would have bypassed the Judicial Council’s nomination of judicial candidates to the governor and would have allowed for

26. Finley, *supra* note 1, at 54.

27. *Id.* at 55 (citing Press Release, Alaska Senators Loren Leman and Dave Donley, Resolution Proposes Increased Accountability from Judiciary (Mar. 5, 1999) available at <http://www.akrepublicans.org/preleman103051999.htm> (last visited Oct. 10, 2001); also citing Dave Donley, et al., *Bess v. Ulmer – The Supreme Court Stumbles and the Subsistence Amendment Falls*, 19 ALASKA L. REV. 295 (2002)).

28. 985 P.2d 979, 981 (Alaska 1999).

29. *Id.* at 987–88.

30. *Id.* at 988.

31. *Id.* at 988 n.57.

32. *Id.* at 988–89 (representing a substantial change, but not enough to qualify as a revision).

33. S.J. Res. 27, 21st Leg., 1st Sess. (Alaska 1999). Mr. Donley also authored an article critical of *Bess v. Ulmer* that appeared in the *Alaska Law Review* in 2002. Donley, et al., *supra* note 27.

34. The proposed amendment failed to garner a majority of the electorate needed to amend the constitution. ALASKA CONST., art. XIII, § 1. Election results can be found at: <http://ltgov.state.ak.us/constitution.php?section=amendments> (last visited Sept. 29, 2004).

35. Sponsor Statement of Senator Robin Taylor, *supra* note 15.

36. S.J. Res. 15, 21st Leg., 1st Sess. (Alaska 1999).

direct appointment of judges by the governor with legislative confirmation in joint session.³⁷ The Senate Judiciary Committee did not move SJR 15 out of committee in time for the end of the legislative session.³⁸ State Senator Robin Taylor's proposal in SJR 22 in 2001, discussed above, also did not go beyond the committee process.³⁹

The final source of dissent mentioned by the author was 2001 Alaska Senate Bill 159, which, as introduced, would have reduced court of appeals judges' terms from eight to four years.⁴⁰ That bill, also introduced by former State Senator Taylor,⁴¹ was not moved from the Senate Judiciary Committee.⁴²

The sources of dissent used by Mr. Finley were press releases and sponsor statements for constitutional amendments proposed by former State Senators Donley, Taylor, and Leman as well as failed legislative proposals.⁴³ The public did not support the proposed constitutional amendment that would have restricted court review of ballot initiatives.⁴⁴ The legislature did not support proposals that would have altered judicial retention systems.⁴⁵ The lack of public or legislative response to the proposals, which were all introduced by the same three individuals, suggests that there was no widespread disagreement with the constitutionally established procedure of selecting and retaining judges. Instead, the public appears generally satisfied with the current merit selection process.

Despite its authority to do so in some areas, the legislature has passed only minor changes to the judicial selection process in the forty-five years since statehood.⁴⁶ Neither the legislature nor the people have amended Alaska's Constitutional provisions regarding judicial selection.⁴⁷ This stability in the judicial selection system may be seen as a

37. *Id.* For a discussion of the judicial selection process, *see infra*, Part III.

38. S.J. Res. 15, 21st Leg., 2d Sess. at 2855 (Alaska 2000) (reporting that resolution heard and held).

39. S.J. Res. 22, 2d Sess. at 1117 (Alaska 2001).

40. S. Res. 159, 22d Leg., 1st Sess. (Alaska 2002).

41. *Id.*

42. S.J. 22, 2d Sess. at 2679 (Alaska 2001).

43. *See* Finley, *supra* note 1, at 54–55.

44. *See supra* note 34 and accompanying text.

45. *See supra* notes 40–41, 44 and accompanying text.

46. *Compare* 1959 Alaska Sess. Laws ch. 50, §§ 8(2), 23 (setting forth judicial selection process for superior court judges and supreme court justices) *with* ALASKA STAT. §§ 22.05.080, 22.07.070, 22.10.100, 170 (Michie 2002); *compare* 1980 Alaska Sess. Laws ch. 12, §§ 1, 5, 12, 19 *with* ALASKA STAT. §§ 22.05.070, 22.07.040, 22.10.090, 22.15.160 (Michie 2002) (defining qualifications of supreme court justices, and court of appeals, superior court, and district court judges).

47. ALASKA CONST. art. IV, § 8.

legislative and public endorsement of the system established by the framers of the Alaska Constitution.

To help those readers interested in the debate on judicial selection attain a fuller and more precise understanding of Alaska's current merit selection system, the next section of this article provides a comprehensive and accurate overview of the system's mechanics.

III. JUDICIAL SELECTION IN ALASKA

Alaska selects judges through a merit selection process involving all three branches of state government as well as the Alaska Judicial Council (the "Council"), an independent citizens' commission chaired by the Chief Justice of the Alaska Supreme Court. While the legislature establishes most judicial positions and qualifications, the Council evaluates applicants and nominates the most qualified. The governor then appoints one of the nominees.

A. The Legislature's Role

In Alaska, the legislature may establish statutory courts in addition to the constitutionally required supreme and superior courts.⁴⁸ Accordingly, it established the district court in 1966⁴⁹ and a criminal court of appeals in 1979.⁵⁰ With newly established courts come judicial positions to be filled.⁵¹ The legislature establishes how many judges sit, both in courts it establishes and in the constitutionally-based superior court.⁵² The legislature also directs how many judges will sit in each judicial district,⁵³ and sometimes specifies that a new judge shall sit on a particular court.⁵⁴ The legislature has also established judicial positions for specific purposes, such as for a "therapeutic" or problem-solving court.⁵⁵

The legislature also sets forth how judicial positions are to be filled for the statutorily created courts.⁵⁶ For both the district court and the criminal court of appeals it adopted the same procedures that the Alaska

48. ALASKA CONST. art. IV, § 1 ("The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature.").

49. 1966 Alaska Sess. Laws ch. 24, § 2; ALASKA STAT. § 22.15.010 (Michie 2002).

50. ALASKA STAT. § 22.07.010 (Michie 2002).

51. *See id.* §§ 22.15.010, 22.15.020 (establishing a district court and assigning an initial cohort of judges and magistrates for each judicial district).

52. *Id.* §§ 22.07.010, 22.10.120, 22.15.020.

53. *Id.* §§ 22.10.120, 22.15.020.

54. E.g., 2001 Alaska Sess. Laws 64 (directing that there be a new superior court judge in Palmer, Alaska).

55. 2001 Alaska Sess. Laws 64 (directing that there be a new superior court judge in Anchorage, Alaska to sit on the newly created "Felony DWI court.").

56. ALASKA CONST. art. IV, § 4.

Constitution established for the selection of supreme court justices and for superior court judges.⁵⁷

Additionally, the legislature establishes qualifications for judicial positions at all levels.⁵⁸ The legislature requires that judges be of a minimum age, be residents of the state for various periods of time, have been engaged in the “active practice” of law, and be licensed to practice law in the state.⁵⁹

Last, and the only area of influence mentioned by Mr. Finley,⁶⁰ the legislature confirms the governor’s appointment of the Council’s three lay members.⁶¹ Non-attorney members are appointed by the governor, who then must be confirmed by a majority of the members of the legislature in joint session.⁶² As is true for attorney members, Council non-attorney appointments must be made with due consideration to area representation.⁶³

Mr. Finley’s article states that the legislature has an “almost non-existent role in judicial selection.”⁶⁴ He argued that “the legislature’s only participation in the judicial selection process comes in the form of voting to confirm the governor’s nominations to fill the three layperson positions on the Alaska Judicial Council.”⁶⁵ In fact, as outlined above, the legislature performs several indispensable roles in the judicial selection process.⁶⁶

The importance of the legislature’s role in the judicial selection process should not be minimized. Although the legislature has no role in the selection of an individual for a particular judicial position, its actions are critical to the proper functioning of the courts and to the delivery of justice in Alaska. As discussed above, only the legislature, as advised by the courts, can consider the needs of the people and determine when and where new courts and judges are necessary.⁶⁷ Only the legislature may determine how judges of statutorily-created courts are selected and

57. ALASKA STAT. §§ 22.07.070, 22.15.170 (Michie 2002).

58. *Id.* §§ 22.05.070, 22.07.040, 22.10.090, 22.15.160.

59. *Id.*

60. Finley, *supra* note 1, at 73 (citing ALASKA CONST. art. IV, § 8).

61. ALASKA CONST. art. IV, §§ 5, 8.

62. *Id.* art. IV, § 8.

63. *Id.*

64. Finley, *supra* note 1, at 73 (citing S.J. Res 15, 21st Leg., 1st Sess. (Alaska 1999); also citing Press Release, Alaska Senators Loren Leman and Dave Donley, Resolution Proposes Increased Accountability from Judiciary (Mar. 5, 1999) *available at* <http://www.akrepublicans.org/preleman103051999.htm> (last visited Oct. 10, 2001)).

65. Finley, *supra* note 1, at 73 (citing ALASKA CONST. art. IV, § 8).

66. ALASKA CONST. art. IV, §§ 4, 5, 8.

67. *Id.* art. IV, § 1 (specifying that jurisdiction and judicial districts are determined by the legislature).

establish minimum qualifications for sitting judges.⁶⁸ If the legislature did not have a role in judicial selection, there would be few judges to select and no standards for selecting them.

Critics like Mr. Finley often overlook the legislature's role in judicial selection and retention processes.⁶⁹ Minimizing the legislative role allows critics to suggest that there is a power imbalance that should be corrected.⁷⁰ In fact, the duties and responsibilities of judicial selection are divided among the three branches of government and the Judicial Council, minimizing the opportunity for any one entity to dominate the process.⁷¹

B. The Alaska Judicial Council's Role

1. *Council Membership.* The Judicial Council is comprised of three attorney members, three non-attorney members, and the Chief Justice of the Alaska Supreme Court.⁷² The method of appointing each Council class varies. The governor appoints the non-attorney members for staggered, six-year terms, and the legislature confirms them.⁷³ Typically, the non-attorney members are appointed with "due consideration" for geographic representation.⁷⁴

Similarly, the attorney members are appointed by the Alaska Bar Association with due consideration to geographic representation.⁷⁵ Generally, one Judicial Council attorney member represents the First Judicial District from Southeast Alaska, one member represents the Third Judicial District from South Central Alaska, and one member represents the Second and Fourth Judicial Districts from Interior, Western, or Northern Alaska.⁷⁶ Bar members from the applicable judicial district notify the bar of their interest in candidacy, and members from that judicial district then vote for their preferred nominee.⁷⁷ The Alaska Bar Association's Board of Governors then votes on whether to appoint the nominee to the

68. ALASKA STAT. §§ 22.05.070, 22.07.040, 22.10.090, 22.15.160 (Michie 2002).

69. See Finley, *supra* note 1, at 73 (arguing that many members of the legislature feel that they play too limited a role in judicial selection in their capacity confirming the governor's selections to the Alaska Judicial Council).

70. See *id.* (discussing options for increasing legislative participation in judicial selection).

71. ALASKA CONST. art. IV, §§ 1, 5.

72. *Id.* art. IV, § 8.

73. *Id.*

74. *Id.*

75. *Id.*

76. Email from Steve Van Goor, Bar Counsel, Alaska Bar Association, to Susie Mason Dosik, Staff Attorney, Alaska Judicial Council (Aug. 30, 2004) (on file with author).

77. *Id.*

Council.⁷⁸ The attorney members are also appointed for staggered six-year terms.⁷⁹

The Chief Justice of the Alaska Supreme Court is a member of the Council *ex-officio* and serves as its chair.⁸⁰ A supreme court justice's term as Chief Justice, and as a member of the Council, is limited to three consecutive years, although he or she may serve additional non-consecutive terms.⁸¹

2. *The Judicial Council's Nomination Process.* The merit selection process for a particular judicial office begins when a vacancy occurs, either when the legislature has created a new position, or a sitting judge has left or is planning to leave the bench.⁸² The Judicial Council notifies all active Alaska Bar Association members of the vacancy and invites applications from all qualified members of the bar.⁸³ Council by-laws allow Council members to encourage specific persons to submit applications and to cooperate with judicial selection committees of state or local bar associations.⁸⁴

Interested attorneys complete the Council's application form.⁸⁵ The application requests information about the attorney's background, including: education, employment history, military record, potential conflicts of interest, prior professional discipline, criminal history, community ties, and recent court or other legal experience.⁸⁶ The applicant also sends a representative legal writing sample so that the Council can assess the candidate's legal reasoning and writing abilities.⁸⁷

After the application deadline has passed, Council staff sends a judicial qualifications survey to every active member of the state bar.⁸⁸

78. *Id.*

79. *See* ALASKA CONST. art. IV, § 8.

80. *Id.*

81. *Id.* art. IV, § 2(b).

82. *See, e.g.*, Position Announcement Letter from Alaska Judicial Council to Alaska Bar Association Members for Anchorage Superior Court (March 15, 2004) (announcing vacancy due to retirement of Superior Court Judge John Reese) (on file with the Alaska Judicial Council); Position Announcement Letter from Alaska Judicial Council to Alaska Bar Association Members for Kenai District Court (June 4, 2002) (announcing vacancy due to creation of judgeship by legislature) (on file with the Alaska Judicial Council).

83. ALASKA JUDICIAL COUNCIL BYLAWS art. VIII, § 1.

84. *Id.*

85. *Id.* art. VIII, § 2.

86. Alaska Judicial Council, Application for Judicial Appointment, *available at* <http://www.ajc.state.ak.us/Selection/Application.pdf> (last visited Sept. 5, 2004).

87. *Id.*

88. Alaska Judicial Council, Application Procedures, *available at* <http://www.ajc.state.ak.us/selection/procedur.htm> (last visited Sept. 5, 2004).

The survey is conducted entirely by independent contractors.⁸⁹ On the survey, attorneys give information about their level of knowledge of each candidate and rate each candidate's professional competence, integrity, judicial temperament, fairness, relevant experience, and overall professional performance.⁹⁰ The survey also asks for general comments about each candidate's legal ability, comportment, diligence, or suitable experience, and any other information that would help the Council in its evaluation.⁹¹

Meanwhile, Council staff performs background checks (using applicant waivers for the information) on professional discipline, credit, civil litigation (as a party), criminal history, and driving records.⁹² Council staff also sends questionnaires to attorneys with whom the candidate has recently worked asking for information on legal abilities, diligence, and other relevant factors, and solicits letters of reference from people whom the candidate has identified.⁹³ Last, the Council invites the public to comment through press releases and its website.⁹⁴ The Council uses any information it obtains only to evaluate each applicant's fitness for office.⁹⁵

The Council next interviews each candidate at a meeting, usually held in the location of the judgeship.⁹⁶ The candidate decides whether the interview will be public or private.⁹⁷ Afterwards, Council members discuss each candidate's qualifications and relative merits.⁹⁸ The Council also holds a public hearing to solicit additional comments about the candidates.⁹⁹ Council members then vote publicly on which candidates to nominate.¹⁰⁰

The philosophy that the framers of the Alaska Constitution expressed during the Constitutional Convention¹⁰¹ evolved into a Council

89. *Id.*

90. ALASKA JUDICIAL COUNCIL, TWENTY-FIRST REP. TO THE LEGISLATURE AND SUP. CT. app. D, at D-2 (Jan. 2003) [hereinafter TWENTY-FIRST REP.].

91. *Id.*

92. *Id.* at D-3.

93. *Id.* at D-2.

94. *See, e.g.*, Press Release, Alaska Judicial Council (June 17, 2004) (inviting public comment) (on file at Judicial Council); Alaska Judicial Council, Comment and Feedback Form, available at <http://www.ajc.state.ak.us/General/feedbackgeneral.htm> (inviting general feedback from the public) (last visited Sept. 5, 2004).

95. TWENTY-FIRST REP., *supra* note 90, at D-3.

96. *Id.* at D-5.

97. *Id.*

98. *Id.*

99. *Id.* at D-6.

100. *Id.* at D-5 to D-6.

101. *See* Alaska Constitutional Convention Minutes Concerning Judicial Selection and Retention, 594 (1956), available at <http://www.ajc.state.ak.us/General/akcon.htm>

policy of nominating the “most qualified” candidates for gubernatorial appointment.¹⁰² Council bylaws state:

The Judicial Council shall endeavor to nominate for judicial office and for public defender those judges and members of the bar whose character, temperament, legal ability and legal experience are demonstrated to be of the highest quality. The Council shall actively encourage qualified members of the bar to seek nomination to such offices, and shall endeavor to prevent political considerations from outweighing fitness in the judicial and public defender nomination processes.¹⁰³

Council members therefore interpret their responsibility as nominating only the “most qualified” and fittest of the candidates rather than those who are merely statutorily qualified.¹⁰⁴

Political affiliation is not evaluated in the judicial selection process.¹⁰⁵ The Council has never imposed any sort of litmus test to vet a candidate’s political views and does not inquire into a candidate’s views on controversial political subjects.¹⁰⁶ If political issues arise, the Council asks whether the candidate, if appointed, could remain objective and make rulings contrary to his or her own views if the law required.¹⁰⁷

Despite the different backgrounds and appointment methods of the attorney and non-attorney Council members, both consistently vote to nominate the same applicants.¹⁰⁸ This agreement is likely due to the use of objective criteria and to the “most qualified” judicial selection philosophy, suggesting that the Council nominates candidates based on merit rather than politics. Council members do not view their role in

(last visited Sept. 29, 2004) [hereinafter Alaska Constitutional Convention Minutes].

102. ALASKA JUDICIAL COUNCIL BYLAWS art. VIII, § 4.

103. *Id.* art. I, § 1.

104. This philosophy evolved from views expressed by framers of the Alaska Constitution. See Alaska Constitutional Convention Minutes, *supra* note 101, at 594 (1956) (stating that the Judicial Council should “seek for the best available” candidates). This philosophy was further discussed at an Alaska Bar Association “Off the Record” continuing legal education program in December 2001. An audiotape of the program is available through the Alaska Judicial Council or the Alaska Bar Association. Alaska Bar Association CLE #2002-027.

105. ALASKA JUDICIAL COUNCIL, FOSTERING JUDICIAL EXCELLENCE: A PROFILE OF ALASKA’S JUDICIAL APPLICANTS AND JUDGES 6 (May 1999) [hereinafter FOSTERING JUDICIAL EXCELLENCE].

106. Alaska Bar Association CLE #2002-027, *supra* note 104.

107. *Id.*

108. Memorandum from the Alaska Judicial Council staff, to Larry Cohn, Executive Director, Alaska Judicial Council, 1–2 (Sept. 8, 2004) (on file with the Alaska Judicial Council).

nominating judicial candidates as political, in contrast to the governor's inherently political role.¹⁰⁹

C. The Executive's Role

The governor has two crucial roles to play in the selection process: the appointment of judges¹¹⁰ and the appointment of non-attorney Council members.¹¹¹ Council members serve staggered, six-year terms and therefore may remain on the Council longer than the governor serves in office.¹¹² Hence, the governor's influence on the Council may outlast his term.

After the Council nominates candidates, it conveys those nominations to the governor.¹¹³ The Council sends each nominee's application and all unsolicited comments and letters that it received during the nomination process to the governor for review.¹¹⁴ The governor must make judicial appointments within forty-five days after receiving the Council's nominations.¹¹⁵

D. The Public's Role

The public has the opportunity to play a substantial role in judicial selection. At each point in the nomination process, the Council issues press releases with brief biographies of each applicant, notice of the Bar survey scores, and names of the Council's nominees.¹¹⁶ The Council also provides opportunities for the public to comment on judicial candidates by sending an electronic comment through e-mail or the Council website,¹¹⁷ writing directly to the Council, speaking directly with a Council member,¹¹⁸ or testifying at a public hearing.¹¹⁹

109. Alaska Bar Association CLE #2002-027, *supra* note 104.

110. ALASKA CONST. art. IV, § 5.

111. *Id.* § 8.

112. *See id.*

113. TWENTY-FIRST REP., *supra* note 90, at D-6.

114. *Id.*

115. ALASKA STAT. §§ 22.05.080(a) (Supreme Court), 22.07.070(a) (Court of Appeals), 22.10.100(a) (Superior Court), 22.15.170(a) (District Court) (Michie 2002).

116. *See, e.g.*, Press Release, Alaska Judicial Council, Anchorage Superior Court, Third Judicial District 1-2 (Apr. 9, 2004) (listing applicants and inviting public comment); Press Release, Alaska Judicial Council Bar Survey, Anchorage Superior Court, Third Judicial District 1-3 (June 17, 2004) (reporting bar survey scores, inviting public comment and announcing public hearing); Press Release, Alaska Judicial Council Anchorage Superior Court Vacancy, Third Judicial District 1-2 (Aug. 10, 2004) (listing the Council's nominees) (all on file with Alaska Judicial Council).

117. *See* Alaska Judicial Council, Comment and Feedback Form, *supra* note 94.

118. *See* ALASKA JUDICIAL COUNCIL BYLAWS art. X, § 2 (describing procedures to be followed upon receipt of such information).

Public comment may have three effects. First, Council staff and members may consider the comment and may conduct more investigation. Second, comments may influence Council votes. Last, all comments not directly solicited by the Council that are not confidential are considered public record and are sent to the governor with the nominees' applications.¹²⁰

The public may also contact the governor directly to try to influence the appointment.¹²¹ Any potential that this creates for "political influence" is tempered by the fact that all of the nominees considered by the governor were in the "most qualified" group of applicants presented by the Council.

IV. RESPONSES TO THE FINLEY ARTICLE'S CRITICISMS OF MERIT SELECTION

A. Responses to Criticisms of Alaska's Judicial Selection Process

The Finley article states: "The attorneys who are appointed to the [C]ouncil owe their positions to the governing powers in the Alaska bar and will almost surely represent the views of the state's most powerful and successful lawyers."¹²² The article suggests that attorney Council members should be elected by the entire Alaska bar rather than appointed by the Board of Governors.¹²³ But the Bar membership has effectively elected attorney Council members for over forty years; its advisory vote has never been rejected.¹²⁴

The Finley article states that "[n]either Alaska law nor Council by-laws provide specific criteria by which judicial applicants and judges up for retention should be evaluated."¹²⁵ Regarding judicial selection criteria, Alaska law sets minimum qualifications for judicial applicants: the active practice of law for a prescribed period immediately before ap-

119. FOSTERING JUDICIAL EXCELLENCE, *supra* note 105, at 9.

120. ALASKA JUDICIAL COUNCIL BYLAWS art. XI, §§ 1–2 (declaring that a source of unsolicited communication may request that the communication remain confidential); TWENTY-FIRST REP., *supra* note 90, at D-4.

121. *Cf.* ALASKA JUDICIAL COUNCIL BYLAWS art. X, § 3 (allowing sitting Council members to provide such personal recommendations or opinions).

122. Finley, *supra* note 1, at 72.

123. *Id.*

124. *See* Email from Steve Van Goor, *supra* note 76 (stating that although the Board of Governors retains discretion to appoint any bar member to the Council, it historically has appointed the bar member with the highest number of votes) (on file with author).

125. Finley, *supra* note 1, at 65 (citing FOSTERING JUDICIAL EXCELLENCE, *supra* note 105, at 11).

pointment, citizenship, Alaska residency, and a license to practice law.¹²⁶ Beyond these minimum requirements, the Alaska Constitution provides that the Judicial Council shall act “according to rules which it adopts.”¹²⁷ Accordingly, Article I, Section 1 of the Judicial Council Bylaws states that members “shall endeavor to nominate for judicial office and for public defender those judges and members of the bar whose *character, temperament, legal ability and legal experience* are demonstrated to be of the highest quality.”¹²⁸ Those bylaws also mandate the Council to “carefully consider whether or not each person under consideration possesses the qualities prescribed in Article I, Section 1, hereof, and shall determine whether each such person is so qualified.”¹²⁹ Published guidelines to judicial applicants establish that judicial candidates are evaluated using six criteria that reflect the qualities set forth in Article I, Section 1: professional competence, integrity, judicial temperament, fairness, relevant experience, and overall professional performance.¹³⁰ All of these criteria are reproduced in publicly available Judicial Council publications.

With regard to Alaska law concerning the evaluation of judges up for reelection, the legislature has deferred to the Judicial Council regarding how it assesses judges.¹³¹ As a result, the Judicial Council Bylaws direct that the Council “conduct evaluations of the qualifications and performance of such justices and judges and shall make the results of such evaluations public.”¹³² Again, the Council’s criteria are: fairness, legal ability, temperament, and overall professional performance, including diligence and administrative skills.¹³³ Thus, the “qualifications” for recommendation for retention remain those stated in Article I, Section 1 of the Council bylaws.¹³⁴

Mr. Finley also stated that “[p]erhaps the strongest criticism of retention elections is that they do not effectively take interest and issue

126. ALASKA STAT. §§22.05.070 (Supreme Court), 22.07.040 (Court of Appeals), 22.10.090 (Superior Court), 22.15.160(a) (District Court) (Michie 2002).

127. ALASKA CONST. art. IV, § 8.

128. ALASKA JUDICIAL COUNCIL BYLAWS art. I, § 1 (emphasis added).

129. *Id.* art. VIII, § 4.

130. See Alaska Judicial Council Judicial Selection Procedures, available at <http://www.ajc.state.ak.us/selection/procedur.htm> (last visited Sept. 29, 2004).

131. ALASKA STAT. §§ 15.58.050, 22.05.100, 22.07.060, 22.10.150, 22.15.195 (Michie 2002) (requiring the Judicial Council to submit judge evaluations and recommendations, at every level of the state judicial system, to the state lieutenant governor).

132. ALASKA JUDICIAL COUNCIL BYLAWS art. IX, § 1.

133. See Alaska Judicial Council, Evaluation/Retention Procedures, available at <http://www.ajc.state.ak.us/retention/retent.htm> (last visited Sept. 29, 2004).

134. ALASKA JUDICIAL COUNCIL BYLAWS art. I, § 1.

politics out of the judicial selection process[.]”¹³⁵ This may be true, but Mr. Finley’s comment misses the point. If the voters perceive that issue and interest politics have been a part of the judicial selection process, they have the opportunity to reject those politics at the polls.

In order to increase public awareness of the judicial selection process, Mr. Finley suggested that the Council make candidate interviews and other information about the selection process accessible to the media and the public.¹³⁶ Such a suggestion must be tempered by the reality that the Council conducts extensive background checks that may reveal very private information.¹³⁷ Therefore, candidate interviews are generally not open to the public so as to protect the privacy of the candidate and the integrity of the selection process.¹³⁸ Candidates do, however, have the option to make their interviews open to the public.¹³⁹ Furthermore, once a candidate is appointed to a judgeship, he or she becomes subject to the same financial disclosures required of all public office holders.¹⁴⁰

The Finley article suggests that Council members adopt a code of conduct, listing specific “do’s” and “do not’s,” including a rule that would prohibit Council members from discussing their work with non-Council members, and one proscribing Council members from employing a “litmus test” to evaluate candidates.¹⁴¹ Fortunately, the Council’s bylaws already contain most of these proposed conduct rules, including: policies “Concerning Selection of Justices, Judges, and Public Defenders,”¹⁴² conflicts of interest,¹⁴³ selection procedures,¹⁴⁴ and confidentiality.¹⁴⁵ Additionally, Council members are considered to be “public offi-

135. Finley, *supra* note 1, at 71.

136. Finley, *supra* note 1, at 76.

137. *See infra* text accompanying note 92.

138. ALASKA JUDICIAL COUNCIL BYLAWS art. VIII, § 3(C).

139. *Id.*

140. ALASKA STAT. § 39.50.110 (Michie 2002) (requiring judicial officers to file reports of financial and business interests).

141. Finley, *supra* note 1, at 75.

142. ALASKA JUDICIAL COUNCIL BYLAWS art. I, § 1.

143. *Id.* art. V, § 2 (requiring Council members to disqualify themselves from discussing or voting on any matter in which they have a substantial personal or pecuniary interest).

144. *Id.* art. VIII, §4 (requiring Council members to carefully consider whether each candidate possesses the highest quality character, temperament, legal ability, and legal experience).

145. *Id.* art. XI, §3 (stating that materials that are part of the deliberative process should remain confidential when “their disclosure would cause substantial and adverse effects to the Council that outweigh the need for access”).

cials,”¹⁴⁶ and as such are prohibited by law from using their position to obtain financial gain.¹⁴⁷

Mr. Finley also expressed concern that Alaska’s merit selection system results in under-representation of minorities and women on the bench.¹⁴⁸ As support, he mistakenly observed that, in Alaska, of the forty-one sitting judges, only two were minorities and nine were women, and all but one of those judges were at the superior court level.¹⁴⁹ When he wrote his article in 2003, he apparently used 2001 data that did not include any data on district court judges.¹⁵⁰ At that time there were fifty-eight sitting judges in Alaska;¹⁵¹ fourteen were women, including: six district court judges, seven superior court judges, and the Chief Justice of the Alaska Supreme Court.¹⁵² In 2003, there were sixty-two judges, thirteen of whom were women, including five district court judges, seven superior court judges, and a justice of the Alaska Supreme Court.¹⁵³ Alaska Judicial Council data show that women are currently nominated by the Council in proportion to the numbers who apply, and minorities are nominated at a slightly higher rate.¹⁵⁴

The Judicial Council represents both the Bar and the public, with members from both sectors.¹⁵⁵ It is responsive to the public and continually seeks public comment and public input on judicial selection.¹⁵⁶ Members are bound by the ethical guidelines for all public officials and by those it has imposed on itself.¹⁵⁷

146. ALASKA STAT. § 39.50.200(b)(15) (Michie 2002).

147. *Id.* § 39.50.090(a).

148. Finley, *supra* note 1, at 67.

149. *Id.*

150. *See id.* There Mr. Finley cited American Judicature Society, “Judicial Selection in the States,” <http://www.ajs.org/js/AK.htm>, which is inaccurate. The cite should have been http://www.ajs.org/js/AK_diversity.htm (last visited Sept. 29, 2004). The diversity information cited was derived from AMERICAN BAR ASSOCIATION, THE DIRECTORY OF MINORITY JUDGES OF THE UNITED STATES (3d ed. 2001). No source was given for gender data.

151. Alaska Court System, 2001 Annual Report 5–6, 8, 12–15, 18–19.

152. *Id.*

153. Alaska Court System, 2003 Annual Report, 5–6, 8, 12–15, 18–19.

154. FOSTERING JUDICIAL EXCELLENCE, *supra* note 105, at 37.

155. *See supra* part III-B.

156. *See supra* part III-D.

157. *See* ALASKA STAT. § 39.50.090 (Michie 2002); *see also* ALASKA JUDICIAL COUNCIL BYLAWS art. V, § 2.

B. Response to Criticisms of Merit Selection in General and Their Application to Alaska's Judicial Selection Process

In addition to Alaska-specific concerns, Mr. Finley expressed concern about merit selection generally.¹⁵⁸ He contended that, rather than taking the politics out of judicial selection, merit selection merely changes which politics are involved and can render the process secretive, undemocratic, too political, and not accountable or responsive to the public.¹⁵⁹ He also argued that the merit system cannot eliminate the possibility for "subtler and more corrupting political influences, including money, cronyism, and political activism" and that "[t]he limited number of people involved in merit systems like Alaska's actually increases the potential for secretive deals and private collaboration."¹⁶⁰ These general concerns are not warranted, given the facts about Alaska's selection system.

In Alaska, the merit selection process is open and responsive to the public.¹⁶¹ Those portions of judicial applications which do not contain sensitive personal information are public records.¹⁶² All Council meetings are open to the public.¹⁶³ The Council holds public hearings¹⁶⁴ and solicits views on the candidates' character, integrity and ability.¹⁶⁵ Council publications and instructions to judicial applicants are available free of charge from the Council office and from its website.¹⁶⁶ In addition, the Council submits a biennial report to the Alaska Legislature that explains the judicial selection process in detail.¹⁶⁷

The framers of the Alaska Constitution intended the judicial selection process to be based on merit with political components.¹⁶⁸ Gubernatorial appointment, by its nature, is a political choice¹⁶⁹ inherently responsive to public pressure. Merit selection was designed to prevent the

158. Finley, *supra* note 1, at 59–63.

159. *Id.* at 60 (citing Honorable Jay A. Daugherty, *The Missouri Non-Partisan Court Plan: A Dinosaur on the Edge of Extinction or a Survivor in a Changing Socio-legal Environment?*, 62 MO. L. REV. 315, 341 (1997)).

160. *Id.*

161. *See supra* part III-D.

162. ALASKA STAT. §§ 40.21.150(6), 40.25.110, 40.25.220(3) (Michie 2002); ALASKA JUDICIAL COUNCIL BYLAWS art. XI, § 1.

163. ALASKA JUDICIAL COUNCIL BYLAWS art. IV, § 1.

164. *See supra* part III-D.

165. *See id.*

166. The Council website can be found at: <http://www.ajc.state.ak.us/> (last visited Sept. 29, 2004).

167. *E.g.*, TWENTY-FIRST REP., *supra* note 90, at app. D.

168. *See generally*, Alaska Constitutional Convention Minutes, *supra* note 101.

169. *See id.* at 584.

politics of appointment from overriding important qualification criteria.¹⁷⁰

Mr. Finley cited a Missouri incident to bolster his argument that political machinations remain inherent in merit selection systems.¹⁷¹ In that incident, the state's judicial nominating commission provided then-Governor John Ashcroft with a list of three nominees to fill a vacancy on the Missouri Supreme Court.¹⁷² Governor Ashcroft appointed his thirty-three year-old chief-of-staff, who had no judicial experience, passing over two experienced appellate judge nominees.¹⁷³ However, the Finley article, its cited source, and *its* cited source fail to adequately describe the nomination process.¹⁷⁴ The article merely reports that the commission and the governor "allegedly collaborated" to manipulate the process.¹⁷⁵

There was no evidence cited in the Missouri case that the former chief-of-staff was unqualified.¹⁷⁶ Neither the Finley article nor its sources relate the relevant history. The governor's final appointment is designed to be a political decision, both in Alaska and in Missouri. Whether the balance between having a qualified candidate and one politically acceptable, or preferred, by the governor was met in that case is not knowable from the information that the Finley article provides or from the sources cited.

This type of collaboration is highly unlikely to occur in Alaska. The "most qualified" policy is designed to protect against a situation in which an applicant's political associations are ever considered in the Council's nomination process.¹⁷⁷ As a result, even politically-connected nominees will be highly qualified candidates for a judgeship.

Because of its policy to nominate only those candidates who are "most qualified," the Council and Alaska governors have been, at times, at odds. In one publicly known incident, Governor Hickel asked for more nominees than the Council had approved.¹⁷⁸ The Council declined to provide more nominees¹⁷⁹ and further responded by amending its by-

170. *See id.* at 598–99.

171. Finley, *supra* note 1, at 60 (citing Daugherty, *supra* note 159, at 328).

172. Gregory Casey, *Public Perception of Judicial Scandal: The Missouri Supreme Court 1982-88*, 13 JUST. SYS. J. 284, 289 (1988-89).

173. *Id.* at 289–90.

174. Finley, *supra* note 1, at 60; Daugherty, *supra* note 159, at 328.

175. Finley, *supra* note 1, at 60 (citing Daugherty, *supra* note 159, at 328).

176. *See* Daugherty, *supra* note 159.

177. ALASKA JUDICIAL COUNCIL BYLAWS art. I, § 1; Alaska Bar Association CLE #2002-027, *supra* note 104.

178. Letter from Honorable Walter J. Hickel, Governor, State of Alaska, to Alaska Judicial Council (Aug. 4, 1993) (on file with Alaska Judicial Council).

179. Letter from Alaska Judicial Council, to Honorable Walter J. Hickel, Governor,

laws to state that it will not provide more names to the governor even if particularly asked.¹⁸⁰

In August 2004, the Governor of Alaska, Frank Murkowski, wrote the Judicial Council a brief letter stating that he was rejecting its recent nominees for a superior court seat in Anchorage.¹⁸¹ Six days later, a public interest group responded by filing a lawsuit against him to compel an appointment.¹⁸² The public responded to the governor's action by writing numerous opinion pieces and letters to the editor, most of which supported the current selection process.¹⁸³ A few opinion articles and

State of Alaska (Aug. 11, 1993) (on file with Alaska Judicial Council).

180. ALASKA JUDICIAL COUNCIL BYLAWS art. VIII, § 5.

181. Letter from Frank Murkowski, Governor of Alaska, to Larry Cohn, Executive Director, Alaska Judicial Council (August 26, 2004) (on file with Alaska Judicial Council).

182. Alaska Public Interest Research Group v. Murkowski, 3AN-04-10618 CI (Alaska Superior Court 2004).

183. See, e.g., Andrew Halcro, *Hey, Hands Off State Judiciary Branch*, ANCHORAGE DAILY NEWS, Oct. 10, 2004, at F2; Thomas B. Stewart, *Judicial Merit System Best for Alaskans*, ANCHORAGE DAILY NEWS, Sept. 26, 2004, at F-2; Bryan Doughty, Letter to the Editor, *Governor's Run Around Constitution is Power Grab and Snub of State Law*, ANCHORAGE DAILY NEWS, Sept. 23, 2004, at B-8; Kevin F. McCoy, Letter to the Editor, *Judge Lisa? Think About It*, ANCHORAGE DAILY NEWS, Sept. 23, 2004, at B-8; Matthew W. Claman, Letter to the Editor, *Before Clark and Governor Criticize Process, They Should Get Facts Right*, ANCHORAGE DAILY NEWS, Sept. 22, 2004, at B-8; Caleb Stewart, Letter to the Editor, *Writer Critical of Judicial Process Should Practice What He Preaches*, ANCHORAGE DAILY NEWS, Sept. 21, 2004, at B-8; Joy Berger, Letter to the Editor, *One Murkowski Reneged on Pledges the Other Abandoned Office She Won*, ANCHORAGE DAILY NEWS, Sept. 21, 2004, at B-6; Patrick Von Gemmigen, Letter to the Editor, *Governor Should Seek to Open Caucuses if He Wants Transparency*, ANCHORAGE DAILY NEWS, Sept. 20, 2004, at B-6; Erik Heiker, Letter to the Editor, *Process for Selecting Judges Should be More Open to Scrutiny*, ANCHORAGE DAILY NEWS, Sept. 20, 2004, at B-6; Kim Elton, *Governor Must First Jump the Hurdles*, ANCHORAGE DAILY NEWS, Sept. 17, 2004, at B-6; Kevin Clarkson, *Truth Lies in Middle on Judge Selection*, ANCHORAGE DAILY NEWS, Sept. 15, 2004, at B-6; Allison Mendel, *Way We Pick Judges Now Avoids Pitfalls*, ANCHORAGE DAILY NEWS, Sept. 15, 2004, at B-6; Shawn Roberts, Letter to the Editor, *Murkowski is Trying to Twist the Rules to Get What He Wants*, ANCHORAGE DAILY NEWS, Sept. 15, 2004, at B-8; Timothy Weidensee, Letter to the Editor, *Council Gave List of Most Qualified; Governor Should Choose from It*, ANCHORAGE DAILY NEWS, Sept. 15, 2004, at B-8; Frank Pratt Jr., Letter to the Editor, *Judicial Council Shouldn't Give in to Murkowski Bullying on Judge List*, ANCHORAGE DAILY NEWS, Sept. 14, 2004, at B-6; Jessica Carey Graham, Letter to the Editor, *Murkowski Slapped Alaskans in the Face by Rejecting Judicial Applicants*, ANCHORAGE DAILY NEWS, Sept. 11, 2004, at B-6; Raymond Wilson, Letter to the Editor, *Corrupt Legislators Have Lost; Next on the List is Princess Lisa*,

letters supported the governor's position.¹⁸⁴ The Alaska Bar Association Board of Governors responded to the Governor's action by passing a resolution that supported merit selection and that called for an appointment of one of the nominees.¹⁸⁵ In September 2004, the governor appointed one of the nominees.¹⁸⁶ This recent controversy again demonstrated that, while some critics would like to alter Alaska's judicial selection process, the public is generally satisfied with it.

Rather than demonstrating a potential for collaboration between the governor and the Council, these incidents demonstrate a state of tension between the governor and the Council. This tension naturally results from a governor's wish for a politically preferable candidate to keep his constituents satisfied and the Council's duty to provide the governor with only the "most qualified" candidates. This tension demonstrates that the merit selection process is working exactly as it should in Alaska.

The Finley article expresses concern regarding the political aspects of judicial appointments but fails to consider that judicial *decisionmaking* is carefully insulated from political influence because of the merit selection system. Once appointed, Alaska judges are not beholden to the pleasure of the one who appointed them. They do not have to campaign for office against opponents, further protecting them from political influence. Instead judges stand for retention election; a nonpartisan "yes" or "no" vote decides whether they should stay in office.¹⁸⁷

The Finley article argues that the problems associated with Alaska's merit selection system may be compounded by a "lack of public knowledge of and interest in judicial [retention] races,"¹⁸⁸ despite the fact that Alaska is a "national leader in providing voter information."¹⁸⁹ The article seems concerned mainly that Alaska voters are unaware of or

ANCHORAGE DAILY NEWS, Sept. 10, 2004, at B-6.

184. See James Clark, *Appointment Process Needs Review*, ANCHORAGE DAILY NEWS, Sept. 13, 2004, at B-4; James Clark, Letter to the Editor, *Judicial Appointment Process Must be Made Transparent*, ANCHORAGE DAILY NEWS, Sept. 12, 2004, at H-4; Kristina Johannes, Letter to the Editor, *Alaska Needs a Constitutional Amendment Defining Judiciary's Role*, ANCHORAGE DAILY NEWS, Sept. 11, 2004; *Judicial Standoff*, FAIRBANKS DAILY NEWS-MINER, Sept. 10, 2004, available at <http://www.news-miner.com/cda/article/print/0,1674,113%7E7252%7E239294,00.html> (last visited Sept. 10, 2004).

185. Board of Governors, Alaska Bar Association, *Board of Governors Resolution Regarding the Judicial Selection Process* (Sept. 14, 2003), available at <http://www.alaskabar.org/index.cfm?id=5853> (last visited Oct. 15, 2004).

186. Sheila Toomey, *Governor Fills Empty Judge Seat*, ANCHORAGE DAILY NEWS, Sept. 22, 2004, at B-1.

187. ALASKA STAT. §§ 22.05.100 (Supreme Court), 22.07.060 (Court of Appeals), 22.10.150 (Superior Court), 22.15.195 (District Court) (Michie 2002).

188. Finley, *supra* note 1, at 60.

189. *Id.* at 61.

do not *use* the information provided to them by the Council.¹⁹⁰ It notes that voters generally retain judges “due more to the lack of an apparent reason to vote the judge out, than for any affirmative reason to reward the judge with another term.”¹⁹¹ Thus his post-appointment concern with Alaska’s merit selection system, apparently, is that it is not political enough whereas his concern at the appointment stage was that it was too political. If the goal is to protect judicial decision-making from improper influence, the protections should be effective when the judge is actually making those decisions – while he or she is holding the office.

The Finley article seems to suggest that some judges should be “rewarded” with another term,¹⁹² implying that others should be “punished” by being voted out. This model is the antithesis of merit selection and retention where candidates are evaluated not by their decisions in office, or by their campaign promises on how they will rule, but on their qualifications and fitness for office.

Although issue and interest politics are never absent from an electoral process, Alaska’s retention election process minimizes their influence. Since statehood, Alaskan voters have removed only three judges from office.¹⁹³ From 1984 to 1998, the percentage of voters who voted to retain all judges in office ranged from 64-71%.¹⁹⁴ Although several groups campaigned against judges in recent elections,¹⁹⁵ they did not persuade the electorate to vote any judges out of office.¹⁹⁶ Some critics of the merit selection system see the high retention rates as a sign of an ineffective accountability mechanism,¹⁹⁷ but supporters believe that high retention rates indicate that the judicial selection system produces excellent judges.¹⁹⁸

C. Response to a Call for Accountability

After a weighing of the pros and cons of the merit selection process, the Finley article states, “[w]hile Alaska’s system of judicial *retention* may provide for a degree of accountability, its system of *judicial se-*

190. *Id.*

191. *Id.* at 60 (citing Honorable B. Michael Dann & Randall M. Hanson, *Judicial Retention Elections*, 34 Loy. L.A. L. Rev. 1429, 1437 (1997)).

192. *See id.*

193. *See* FOSTERING JUDICIAL EXCELLENCE, *supra* note 105, at 14 n.36; TWENTY-FIRST REP., *supra* note 90, at app. F.

194. FOSTERING JUDICIAL EXCELLENCE, *supra* note 105, at 19, tbl. 1.

195. *Id.* at 14.

196. *Id.* at 19.

197. *See* Finley, *supra* note 1, at 63 (stating that retention elections’ attempt to hold judges accountable is a façade when there is little public interest).

198. FOSTERING JUDICIAL EXCELLENCE, *supra* note 105, at 69.

lection is notably lacking in that respect.”¹⁹⁹ It concludes that Alaska’s selection system would benefit from increased accountability.²⁰⁰ To that end, the article suggests that each member of the bar elect the Council’s attorney members.²⁰¹ As previously discussed, that has, in effect, been occurring for over forty years.²⁰² The article recommends imposing ethical standards for the Council members,²⁰³ which it has already adopted in its bylaws.²⁰⁴ The article encourages increased transparency in the selection process.²⁰⁵ However, the Alaska process for holding judges accountable in retention elections, which the Finley article correctly recognizes as one of the most visible in the country,²⁰⁶ is the exact same process used when selecting judges.²⁰⁷ These so-called “reforms” of the judicial selection process are, therefore, already in place.

The Finley article suggests giving the governor, the president *pro tempore* of the Senate, and the speaker of the House each an opportunity to appoint one non-attorney member of the Council.²⁰⁸ It is unclear how this would decrease the potential for political cronyism or undue influence since the majoritarian political influences in the House, Senate, and Governor’s mansion are currently and often occupied by members of the same political party.²⁰⁹

Traditionally, tensions exist between judicial independence and judicial accountability. The Finley article attempts to resolve this tension by offering suggestions to make the Council not “more” accountable but “differently” accountable. All three non-attorney members are chosen by the governor and confirmed by the legislature.²¹⁰ Once appointed, they do not serve at the pleasure of the governor but rather serve a designated six-year term.²¹¹ Having the non-attorney members appointed by a different political entity would not increase accountability of the Council but would merely shift political accountability to the legislature

199. Finley, *supra* note 1, at 71 (emphasis added).

200. *Id.* at 72.

201. *Id.*

202. *See supra* part III-B.

203. Finley, *supra* note 1, at 75.

204. *See supra* part IV-A.

205. Finley, *supra* note 1, at 75–76.

206. *Id.* at 76.

207. *See* FOSTERING JUDICIAL EXCELLENCE, *supra* note 105, at 6–14 (evaluation criteria for judicial appointments and evaluation standards for judicial retention).

208. Finley, *supra* note 1, at 75.

209. *See* State of Alaska, Official Election Results of the November 5, 2002 General Election, available at <http://www.gov.state.ak.us/lsgov/elections/02genr/data/results.htm> (last visited Sept. 7, 2004).

210. ALASKA CONST. art. IV, § 8.

211. *Id.*

and would do nothing to increase the accountability of judges. The governor is properly accountable for his or her judicial appointments when up for re-election.²¹² The judges are themselves accountable in retention elections.²¹³

The judiciary should be accountable to ensure that judges are deciding each case on its merits and not making decisions based on illegitimate factors such as bias, personal politics, or improper influence. Retention elections in Alaska sufficiently provide for judicial accountability.

V. CONCLUSION

The Finley article, focused on reforming Alaska's merit selection system, conversely provides an opportunity to show that most of the author's suggested reforms are already elements of the current system. The Council is responsive to the public's need for judicial accountability through its extensive evaluation of the performance of judges standing for retention. It gives the public many channels to participate in the work of nominating attorneys for judgeships. The Council binds itself to the highest ethical standards and looks for similar standards in applicants for judgeships. Alaska's judiciary is considered one of the best in the country, showing that the legislature, governor, and Council are cooperating to fully implement the system created by the framers of the Alaska Constitution.

212. See ALASKA CONST. art. III, §§ 3–5 (limiting a governor to no more than two four-year terms of office and requiring that he or she be chosen by a plurality of votes).

213. ALASKA STAT. §§ 22.05.100, 22.07.060, 22.10.150, 22.15.195 (Michie 2002).