Supreme Court

Court of Appeals

State of Alaska

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February 19, 2020

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Re: *State of Alaska v. Recall Dunleavy*
Supreme Court No. S-17706

Dear Counsel:

By virtue of his office, Chief Justice Joel Bolger serves as the administrative head of the Alaska Court System and the chairman ex-officio of the Alaska Judicial Council. In those capacities, he has joined and issued public statements that may relate to the events listed as recall grounds 1 and 3(a) under consideration in this case. Chief Justice Bolger does not have any personal bias or prejudice concerning the parties or attorneys involved in this case, or personal knowledge of any disputed evidentiary facts, and he knows of no other reason why he cannot render a fair and impartial decision in this matter. But any

party may file a written motion to disqualify Chief Justice Bolger by **February 26, 2020**. The response to any such motion must be filed within five days thereafter. Failure to so move will be construed as a decision to waive the potential disqualification.

Thank you for your attention to this matter.

Sincerely,

Meredith Montgomery

Attachments:

Opening Remarks, Alaska Judicial Council, March 22, 2019
Governor Comments on Judicial Nomination Process, March 27, 2019
Alaska Supreme Court Statement Regarding Recent Budget Cuts
Alaska Court System Report, AFN Convention, October 17, 2019

Opening Remarks
Chief Justice Joel Bolger
Alaska Judicial Council
March 22, 2019

We called this meeting to address two communications the council received from the governor's office yesterday. In the first letter, the governor refuses to appoint a judge from the nominees we provided for the Palmer Superior Court position. The governor suggests that the council should nominate all qualified candidates for the position and provide the reasoning supporting the nominations. In the second letter we received, the governor's chief of staff requests access to the confidential information the council solicited during the nomination process.

I believe the governor's office does not understand the constitutional requirements for these nominations. So I'm going to spend some time outlining the requirements of the constitution and the bylaws and procedures the council has adopted to follow the constitution.

Article IV, section 5 of the constitution provides that "The governor shall fill any vacancy in an office of . . . superior court judge by appointing one of two or more persons nominated by the judicial council."

During the convention debates, the members of the judiciary committee were questioned about whether the governor had any authority to refuse to appoint from the candidates nominated by the council. Delegate Rivers stated that the governor "has no alternative but to pick one of the names that are presented to him by the judicial council." Delegate McLaughlin, who chaired the committee, later emphasized this requirement, stating that "under this article, the governor has no right of refusal." So it is clear that the founders intended this provision to mean exactly what it says: The governor must appoint one of the candidates nominated by the council.

The governor's letter to the council suggests that the council should nominate all the candidates who are qualified for each vacancy. For appointment to the superior court, a judge must be licensed to practice law,

engaged in the active practice of law for five years, and a resident of the state. All of the applicants for the Palmer superior court had these minimum qualifications. Indeed, it is very rare that the council would receive an application from an attorney who does not have these minimum qualifications. But the founders of our constitution did not intend that the citizens would be required to have their cases decided by a judge with minimal qualifications. Instead they intended that the council would "seek for the best available timber," that is to nominate only the applicants who are *most* qualified for the position. And the Alaska Supreme Court has determined that the council may discharge its constitutional duty by nominating at least one more candidate than the number of judicial positions to be filled.

The judicial council has accordingly adopted detailed bylaws that provide for a comprehensive four to five month application process by which the council endeavors to nominate the most qualified applicants. Notice of a vacancy is published widely and sent directly to all active attorneys in the state. Each candidate must fill out a detailed application including public information, such as academic and employment history, community service, and recent litigation experience, and also private information, including the candidate's recent income, any conflicts of interest, medical history, and any disabilities that may require accommodation.

The council also solicits information from other attorneys and judges who have been involved in litigation with the applicant, personal and professional references, and employment verifications. When requesting this information the council makes it clear that the responses will be confidential so that the response will not be colored by the fear of public exposure. But the council also gives the responding party the option to have the information forwarded to the governor in the event the applicant is nominated. And any reference letters that are not solicited by the council are public information.

The council also conducts a survey of all members of the Alaska Bar Association. The survey asks the attorneys to rate each candidate on six

criteria: professional competence, integrity, judicial temperament, fairness, suitability of experience, and overall professional qualifications. The results of the survey are collated and available to the public.

The survey also allows individual attorneys to make comments about the applicants. But again, the council wants to ensure that the attorneys are free to comment on sensitive issues. If an applicant is prone to angry outbursts, or inappropriate comments, or other character flaws, we want to learn about that and investigate during the application process. So the council maintains the source of these comments as confidential, and only the substance of the comments is released to the judicial candidate.

Many years ago, the judicial council asked for an opinion on whether we could maintain the confidentiality of some of this sensitive application material. The attorney general's office advised that the Alaska Constitution granted the council the power to adopt rules regarding the confidentiality of its own records. That is exactly what the council has done. The confidentiality rules I am describing are all laid out in the council's bylaws.

After the application and survey have been completed, the council schedules a public hearing and interviews, usually in the location of the court vacancy. The candidates can choose to have a public or private interview. My experience is that there has not been much attendance, even when an applicant chooses a public interview. But we often get a lot of information about the applicants during the public hearing process.

After the hearing and interviews are complete, the council meets in executive session to determine the most qualified applicants. Each council member considers the selection criteria set forth in the council's bylaws: 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 and then determines the candidates who are most qualified by considering all the candidates who have applied, the position applied for, and the community in which the position is located. The council deliberates in executive session to promote candid discussion about the qualifications of the applicants.

The governor's letter asked about the council's reasoning for its nomination decisions. But each council member votes independently on the candidates in a subsequent public vote. Although the council members discuss the qualifications of each of the applicants, there is no necessity to reach a consensus about the council's reasoning because there is no requirement for the council to reach a consensus. Instead, if a candidate receives four votes, then their name is forwarded to the governor.

The governor's letter questions the council's decision to nominate a candidate for one position and not for another position. But this is not uncommon because the council members consider more than the individual candidate's qualifications. Their votes are also determined by the strength of the other candidates, the nature of the open position, and the community the judge will serve.

Let me give you an example from my own experience. In 2007, I applied for the Alaska Supreme Court. I was nominated by the judicial council, but I was not appointed by Governor Palin. In 2012, I submitted another application. This time I was not nominated. But I applied again in 2013, and I was then nominated and appointed by Governor Parnell. My experience does not mean the council was arbitrary. I was not nominated in 2012 because there were more highly qualified candidates for the position at that time.

I believe the Alaska Judicial Council maintains more public information about the candidates for judicial selection and judicial retention than any other state agency involved in an appointment process. Sometimes I think that my entire professional life is on the council's web site. And I believe the Alaska Judicial Council maintains a more neutral nomination process than any other State in the country. But I am likewise convinced that the procedures I have outlined are necessary for the public to be served by the most qualified candidates for judicial positions.

Office of Governor
MIKE DUNLEAVY

Governor Comments on Judicial Nomination Process Following "Fruitful and Productive" Meeting with Chief Justice Bolger

March 27, 2019

Wednesday, March 27, 2019 (Nome, AK) – Alaska Governor Michael J. Dunleavy today issued a statement following a meeting yesterday with Alaska Supreme Court Chief Justice Joel Bolger:

"Yesterday, I met with Chief Justice Bolger to discuss a variety of issues surrounding the process to fill a vacancy on the Palmer Superior Court," **said Governor Dunleavy.** "This meeting was both productive and fruitful, and provided important clarification about process I was seeking when deciding to delay this nomination. As a result, I intend to interview the two Palmer Superior Court nominees and will soon fill this vacancy from the council's nominees.

"In declining to name a second nominee to the Palmer Superior Court, I announced my intention to better understand the judicial nomination process and to further clarify whether or not the Council was in fact upholding the merit and qualifications-based standard. My hope was to further review and consider the information before us and ensure this process was thoroughly understood by my office," **Dunleavy said.** "Based on my discussions with Chief Justice Bolger, my concerns have been satisfied. I expect to make an announcement on this matter in the near future."

On March 21st, 2019, Governor Dunleavy announced his selections to fill Alaska Superior and District Court judgeships in Utqiagvik, Kodiak, Anchorage, and Palmer, but declined to fill a second vacancy to the Palmer Superior Court without additional information.

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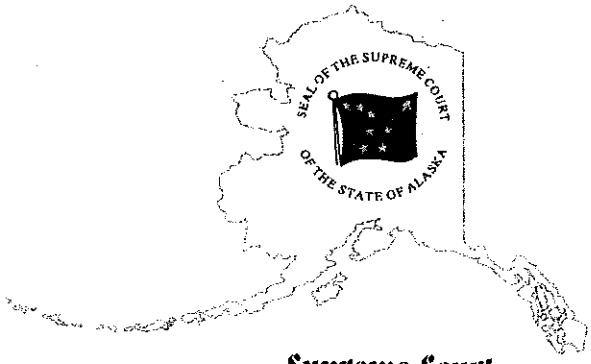
Chief Justice
JOEL H. BOLGER

Justices
Daniel E. Winfree
Craig Stowers
Peter J. Maassen
Susan M. Carney



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Alaska Supreme Court Statement Regarding Recent Budget Cuts

On Friday, June 28, 2019, Governor Dunleavy announced vetoes of two legislatively appropriated budget items for the Alaska Court System. The first was $1,756,300 that the legislature appropriated for small cost of living allowances for our non-union, non-judicial staff, designed to match union contract pay increases approved by the legislature for similar state employees in other government branches. The second was $337,700 of the legislature's original $7,217,200 appropriation for our two appellate courts. The second veto carried a statement explaining it was in response to the governor's disagreement with a recent supreme court decision.

Alaska, like the country as a whole, has a system of government with three co-equal branches. At its most basic, this means that the legislature makes the law, the governor enforces the law, and the supreme court, when faced with a constitutional challenge to a law, is required to decide it. Legislators, governors, and all other Alaskans certainly have the right to their own opinions about the constitutionality of government action, but ultimately it is the courts that are required to decide what the constitution mandates. In a democracy based on majority rule, it is important that laws be interpreted fairly and consistently. We assure all Alaskans that the Alaska Court System will continue to render independent court decisions based on the rule of law, without regard to the politics of the day.

Finally, we reiterate to our dedicated court staff that we value your extraordinary efforts to serve Alaska's citizens each and every day. In response to Alaska's recent financial crisis and in recognition that the court system has a duty to be a good steward of the public's money, we proposed and the legislature made significant reductions to the court system's operating budget, reductions that resulted in the closure of all courts statewide on Friday afternoons and a consequent reduction of your salaries by 4% over the past three years, a cut not shared by the other two branches of government. In fairness we urge the legislature to restore the cost of living allowances that will return you to equal footing with employees of the executive and legislative branches.

ALASKA COURT SYSTEM REPORT
ALASKA FEDERATION OF NATIVES CONVENTION
October 17,2019

Good morning. I deeply appreciate the opportunity to be with you here this morning and to offer this report from the Alaska Court System. My report will be short and focused on three of the court system's longstanding interests: our continuing interest in Tribal Partnerships, the challenge of Justice Delayed, and our current concern about attacks on Judicial Independence.

Many of you already know about the Henu' Wellness Court in Kenai, where a state court judge and a tribal judge sit together in a therapeutic court for people struggling with substance abuse issues. And Senior Superior Court Judge Eric Smith has been working steadily over the past two years to reach agreements with tribal organizations that want to participate in state court sentencing proceedings. I'm pleased to report that this opportunity has recently been expanded for the 22 villages in our Second Judicial District, which includes the North Slope Borough, the Northwest Arctic Borough, and the area surrounding Nome and Unalakleet. Just last week Presiding Judge Paul Roetman from Kotzebue signed an administrative order that lays out a procedure for tribal organizations to get information about cases that arise in their area and to request referral to local peacemaking circles or other tribal restorative justice programs for sentencing recommendations. I want to thank Judge Roetman for his leadership on this issue. And I also want to

thank President Percy Ballot from the Native Village of Buckland for bringing this opportunity to our attention.

Our second interest is in addressing the longstanding problem of Justice Delayed. We have a huge backload of felony cases in Anchorage and significant challenges in bringing cases to trial in other parts of the state. We have been able to try the cases that are ready for trial by using our regular criminal bench, by bringing in retired judges who work on a temporary basis, and by assigning judges from other divisions. But in too many cases the agency attorneys are not ready to bring the cases to trial. In other cases, the police agencies do not develop or disclose investigation materials until late in the process. Both of these problems involve the application of adequate funding resources to bring these cases to trial on a timely basis. I applaud the decision of this Convention to examine these problems in a panel presentation later today.

Third I want to say a word about the urgent necessity of maintaining fair and impartial courts. We have a state with a great deal of diversity: political diversity, racial and ethnic diversity, and geographic diversity. Under these circumstances, it is essential that judges maintain the independence to make decisions based on the law and the facts and not on political or personal considerations. But we are facing a great deal of political pressure. Some people want to make the judicial selection system more political. Others would like to impose political consequences for the content of judicial decisions. I

respectfully ask this Convention to join me in resisting political influence on our courts.

Finally I want to invite you all to follow what we are doing on an ongoing basis. Most of our court proceedings are open to the public. On any business day you can walk into a courtroom in your local area and see how we deliver justice. But if that seems a little odd, please just take the time to take a look at the Alaska Court System Facebook page. There you can see what we are doing to promote justice in our courts and in the community.

Thank you again for the opportunity to report to you this morning.