Bill No. SB 393, 395, 396, 398

SENATE STATE ADMIN.
EXHIBIT NO. 8
DATE 2.18.05
BILL NO.

Court Reform Testimony *(Sen. Joe Balyeat)*

Mr. Chairman, members of the judiciary committee, for the record I'm Sen. Joe Balyeat representing SD 34, North Gallatin County and Broadwater County . I'm a Certified Public Accountant, a National Merit Scholar graduate from the U of M, and the former Chairman of Montanans for Better Government. I am not an attorney.

Today I bring before you a series of bills attempting judicial reform – specifically SBs 391, 392, 394, 397, 399, and 400. All of these bills are based upon the same arguments, so after consultation with Chairman Wheat, we determined for the sake of the committee's time, and for the benefit of the many witnesses on these bills; that we'd just combine them all into one hearing. Unfortunately, that means this will probably be a longer than usual hearing, and undoubtedly a longer introduction as I explain these many bills and the reasoning behind them. So I appreciate the committee's indulgence to bear with me, and I'll try to keep the presentation rolling and as short as possible.

The US Constitution, and the Montana Constitution as well, have attempted to set up a limited government; based upon the notion of checks and balances, that government would be divided into 3 branches – legislative, executive, and judicial; and that, with no branch having absolute power, we might avoid the old plague – **power corrupts and absolute power corrupts absolutely**[i].

But it was the distinct fear of some founders that an unrestrained judiciary was perhaps the greatest danger. As Thomas Jefferson said, "The germ of destruction of our nation is in the power of the judiciary... working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief over the field of jurisdiction, until all shall render powerless the checks of one branch over the other and will become as venal and oppressive as the government from which we separated". (Jefferson, 1821)

Jefferson saw it clearly, despite the old saw about "checks & balances", the fact is there is no check or balance on the Court. If the legislature does something stupid the Governor can veto it, or the Court can declare it unconstitutional. If the Governor does something stupid, the legislature can over-ride his veto, or the Court can rule it unconstitutional. But if the Court, God forbid, does something stupid (and I did say "IF"), there is no check & balance in place – not even the combined power of the legislative and executive branches together can over-rule the Court. And in fact, since the MT court has decided to start throwing out citizen initiated constitutional initiatives, it appears that in MT at least, not even the citizens themselves can over-rule the court.

Particularly after 1803 in Marbury vs. Madison, when courts garnered to themselves the power to overturn legislative and executive actions on the basis of Constitutionality; there have been many legal scholars, on both the left and the right, who have warned of the dangers of judicial omnipotence and tyranny; because they, as did Jefferson, feared it emasculated the checks & balances of our three branch government. And at this point I need to set the record straight for the committee -- despite the erroneous statements made in various news articles, it should be quite clear that I did not bring these bills as a partisan retribution against the Court for the HD12 court decision or the same sex fringe benefit decision. Those so-called motivations were interjected into a news story after a 45 minute news interview within which neither court case ever came up, and preposterously put forth as the motive for my bills despite the fact that I made all these bill draft requests weeks before either court case was even decided.

These bills are not brought for partisan purposes, these bills are brought because I, along with many Court critiques on both the right and the left, fear that the Court is becoming all powerful, to the great diminishment of the power of the legislature – which is the elected representatives of the good people of Montana. And I ask the committee to recognize as evidence of my non-partisan motives the very fact that I'm bringing these bills at the precise time that this legislature is now controlled by those across the aisle from me --- if I were merely playing partisan games here – why would I want to invest more power in the legislature relative to the Court, when the legislature is controlled by the opposite party?

No, in fact, my concern is that the power of the legislature has been by Court decree, so diminished in recent years that it is rapidly becoming somewhat of a meaningless, ceremonial role. And that if the trend continues, it will become increasingly difficult to recruit good men and women from either party who are willing to serve in this manner. And I freely confess my own frustrations in this regard – are we really conducting significant governance here, or has the Court relegated us to the dark corners of trivial regulatory minutia about whether or not you can make a right turn on red from the far right lane?

Now some will say that it has been over two centuries since the Court's acquisition of absolute power to over-ride the other 2 branches. So why now, Senator, do you see such a heightened danger; and why now, do you see a need to enact these various bills restraining the Court's power? My answer is this – Even though the Courts long

ago grabbed the power to completely over-turn the other two branches of government, in prior eras the Court imposed self-restraint upon itself to prevent abuses which come with too much power. This was done through adherence to six historical rules of jurisprudence which have all been abandoned by this MT Court in recent years:

1) Courts historically confined themselves to a narrowly constructed decision which went no farther than necessary to judge the needs of the case. The MT Court has clearly discarded this particular self-restraint, ruling expansively beyond the needs of the case in many recent decisions ranging from abortion cases (where they admonished <u>any</u> future legislatures to forget about euthanasia restrictions even though euthanasia had nothing to do with the current case)[ii], to environmental cases[iii], to a wide range of topics which should give legislators on the right. left, and middle cause for concern. And you needn't take my word for it, you may simply consult the various minority dissenting opinions which so lucidly illustrate this practice.
2) Historically, courts had another rule of self-restraint, and that was to leave the interpretation of so-called "positive rights" to the legislature. This court has utterly abandoned that rule. A brief explanation: Constitutions contain two kinds of rights. The best understood of these are what legal scholars call "negative rights" – rights that restrain government from oppressing the people. Examples are free speech and freedom of religion. Negative rights are rights we <u>all</u> appreciate because they don't cost anybody else anything for you to exercise them. The other kind of rights are called "positive rights," although a better word would be "entitlements." These are guarantees that government will give people something, usually at public expense. Examples in MT's Constitution are the guarantee of a basic quality education; the right to earn a living; and the right to a clean and healthful environment.

   Traditionally, courts have freely enforced negative rights. However, positive rights or entitlements involve all sorts of political judgment calls that responsible judges recognize they do not have the expertise or popular mandate to make. For example, when the U.S. Supreme Court is faced with the demand for enforcement of an entitlement, it will virtually always refer the case to what it calls the "political branches" – the legislature and president. This is part of what is called the "political question doctrine."

   The Montana Supreme Court almost completely disregards the political question doctrine. It has deeply immersed itself in matters that it has no expertise or mandate to decide. This is one reason that some scholars have said that the court really doesn't act like a COURT at all. Historical jurisprudence argued that negative constitutional rights were self-executing – that the Court could decide cases and make rulings based upon these rights without the need for legislative intervention. But positive rights, conversely, were non-self executing. That Courts could not arbitrarily take the power to define those rights unto themselves without legislative intervention --- that the legislature must statutorily flesh out the meaning and extent of those rights. And if there were conflicting positive rights – for instance the right to earn a living and the right to a clean and healthful environment – the legislature, through political discourse and statutory law would decide the prevailing balance rather than judicial decree.

   Former Congressman Pat Williams has called Montana's constitution "the most *progressive* constitution in the entire United States". While some might quibble about whether the correct word is *liberal* rather than *progressive*; this is one point that Pat and I agree on (and there haven't been many).

   Now the Court will argue that <u>they</u> really aren't out of control, that they are simply enforcing MT's Constitution which is very "progressive". I do partially agree with their statement. But that's precisely why we need to place some sideboards on the Court's power in Montana. MT has an expansive Court enforcing a "progressive" constitution in a manner which abandons all the self-restraints which existed in historical jurisprudence. With a constitution which contains so many flowery statements delineating the positive rights and entitlements of its citizens, and with a Court which has no inhibitions whatsoever about <u>selectively</u> enforcing positive rights without legislative statutorial oversight; the net result is a Court converted to "super legislature" -- continuously legislating from the bench. This Constitution in the hands of this Court, is assault with a deadly weapon on the traditional role of the legislative branch.
3) Court's historically restrained themselves through their own prior case law. That they would make their decision in a new case based upon the same rationale and same interpretation of law (constitutional and statutory) as had governed their decisions in prior cases. The present Court has so much abandoned this historical restraint that MT's Court stands on the statistical astronomic fringe in this regard – A study by UM's Jeff Renz (a political liberal and former legislative director of the Montana ACLU) revealed that between 1991 and 1999 the MT Court overturned 99 of its own prior cases. Renz revealed that other states

with similar caseloads (i.e. Vermont) only overturned 23 cases during that time[iv]. Another study revealed the MT court overturning its own cases at the #1 fastest rate in the entire nation among states without intermediate appellate courts, in fact a rate more than double that of the second place state[v].

4) Historical jurisprudence left the "power of the purse" within the Legislative branch. That in a system of divided government, the legislature should control the purse strings in deciding how much money to allocate to each segment of the budget. And of course you need look no further than the recent decisions on school funding to realize that this particular self-restraint is no longer deemed necessary by MT's Court.
5) Historical jurisprudence required the Court to let the law govern itself and to be bound by their own procedures. To follow logical interpretations of law as a map through a maze, and let the final decision come out wherever it may. Before a plaintiff could even bring a case, he had to have "standing" – that is, a genuine personal stake where he had suffered loss. Before an appeals court got to hear a case, it had to go to the trial level first. Any important decision had to be accompanied by a careful supporting opinion and citation of precedent. Justices were not supposed to talk about cases out of court or make up their minds in advance of a hearing. Every litigant in a case where there was a factual dispute was entitled to an evidential hearing.

   The Montana Supreme Court has repeatedly ignored these restraints. It has all but abolished the standing requirement in political cases[vi]. It has repeatedly seized cases from lower courts – and then either decided them without proper procedures or a factual hearing, or neglected them for months on end. It has twice – in both the education funding decision and the recent election decision – issued orders unsupported by opinions, on the promise that those opinions will come "later".

   Leaks from this court and pre-set agendas have become legendary. In recent years the Court has engaged in reverse-engineering – justices deciding beforehand how they want the case to come out, then backing into some rational basis in law to disguise what is otherwise nothing more than a politically dictated decision. Some might argue that I'm merely making this claim based upon recent politically-charged Court decisions regarding redistricting, assignment of Senate holdovers, and the HD12 election. But that is not the case – back in 2002 the chief counsel for our Democrat Attorney General's office stated publicly his "complaint that the Court is 'activist' and 'result-oriented'"[vii]. He also stated, "I believe they sometimes let their philosophies get in the way of simply deciding the law."[viii]
6) Historical jurisprudence provided citizens a defense of last resort. That if the Court made a constitutional ruling so foolish so as to enrage the citizenry; that the citizenry could at least amend the constitution through the initiative process; thus over-ruling the Court. But this Court has even emasculated that potential safeguard. This happened in 1999 in the CI-75 case. While the left was applauding this case because it voided the people's decision to limit tax increases, the left should've been looking at the deeper, longterm consequences of the decision – which rendered it nearly impossible for the people themselves to amend their own constitution regarding any significant issue.

   This was done through an Orwellian re-definition of the meaning of words. In Orwell's book 1984 there is an all-powerful, all intrusive government. One way it controls the people is through word definitions. The only dictionaries available are on computer. If the government wants to go back and change prior history, and prior laws; it simply goes into the computerized dictionaries and changes the meaning of key words with a mere computer keystroke[ix]. In the CI-75 case, the key words were "single subject rule". Three prior court cases, which had withstood 96 years of scrutiny, stated clearly that you could bring ballot initiatives which changed several parts of the Constitution, so long as the several changes are related to one single subject or unity of purpose. The Court didn't like this definition of the single subject rule because that wouldn't jive with it's own predetermined outcome, so it reverse engineered and created its own new definition – the "single subject rule" now means the "single section rule". That you can't have any constitutional ballot initiative which changed more than one section (or part) of the Constitution; even <u>if</u> it revolves around a single subject.

Now, if you think I'm making this all up please go back and pick up the CI-75 decision. I quote verbatim from the Court's own decision: *"CI-75 affects multiple <u>parts</u> of Montana's Constitution...The unity of subject rule that the Court applied in Hay and Cooney is unworkable. Under the Court's rationale in Hay, for example, a constitutional initiative to "improve Montana's government" could amend virtually every part of Montana's*

Constitution but have one single subject. The unity of subject rule set forth in Hay and Cooney is so elastic... We decline to affirm such a rule.... To the extent that this holding is in conflict with Hay, Teague, and Cooney, those decisions are overruled."[x]

More disturbing than the reverse engineering so evident in this decision, more disturbing than the clear untempered penchant to overturn prior court cases; is the specific subject matter of this statement. Citizens no longer have any real ability to over-rule the Court via the initiative process because virtually all substantive constitutional amendments change more than one part of Montana's Constitution. Let me give you one mind-boggling example:

As one of my bills, I wanted to bring a referendum to the people to let them vote on the following concept – If the Supremes over-ride a legislative action, that will automatically generate a referendum for the next election; allowing the people to either sustain or veto the Court's ruling. But the lawyers downstairs tell me I can't bring that legislation to the people because it would violate the Court's single section rule – that it changes the referendum rules in one section of the Constitution, and changes Supreme Court rules found in another section.

And this is the absurdity we are now faced with on almost any substantive issue. Why? Regardless of whether you like what Montana's Constitution says, one characteristic it has is that it is not very logically laid out. For instance, statements dealing with schools and school funding are laid out in several different parts of the Constitution; so any attempt by the people themselves to over-ride the Court's school funding decision, for example, would be thrown out by the Court as violating the single section rule.

Short of calling a full constitutional convention to re-write our entire constitution, we are almost to the point where there is nothing left for Montanans to do but suffer silently beneath the weight of unrestrained dictatorial judicial power. My friends on the left side of the aisle may say, "Joe, we're not suffering at all; we're pleased with many of the Court's current pontifications on environment, abortion, employer mandates, euthanasia, school funding, etc. But consider this – don't you at least see that what we have here, *at best*, is a benevolent dictatorship; an all-powerful oligarchy of seven which right now, with the political wind blowing your direction, is giving you everything you want. But if the wind shifts, and personalities change on the court, that all powerful dictatorship may not be so benevolent to your cause. After all, if it can decide cases expansively with no self-compunction to restrain itself with prior case law, things can change pretty quickly.

So this is why we need to consider some of these bills I bring before the committee today. If the court without self-restraint starts legislating from the bench; then the people must enact some sort of restraint on them. Otherwise, what you have is not just another legislative body, but a **super legislature** – with all of the power and none of the constraints which MT's citizens have placed on its true legislature – a citizen legislature which must live and work in the real world under the laws it passes.

And I need to add, this super legislature is so powerful it can even pass laws retroactively – with true Orwellian consequences. If we legislators change laws, those changes only apply prospectively, from that date onward. But when the Supremes do it, as they did with CI-75, that change goes back and invalidates elections of the people which were perfectly legal based on case law at the time of the election. (This also violated the 14th Amendment of the U.S. Constitution).

So this is the rationale for these bills. If the Supremes, with no self restraint, are going to legislate from the bench anyway... then they should be subject to the same constraints as legislators. Here's my list:

SB 391 Term Limits for judges – Montanans want to avoid a professional class of rulers making laws over them. That's why they enacted term limits and set legislative pay at such a low level – so that "citizen legislators" must return to the private sector to make a living. *If judges want to **"legislate from the bench"**, they should be treated like legislators.*

SB 392 Set judges pay at the same level as legislative pay. "Legislating" judges should be paid the same low rate, to ensure they work in the private sector (under the laws they dictate) for their primary livelihood. I'll admit this is my most drastic proposal, yet it does have merit; and I'm open to amendments regarding the level of that pay.

SB 394 No bar requirement to be a judge. "Legislators" should not come from a restricted class, or they will pass laws which are disconnected from the common man. Not even U.S. Supreme Court judges must be lawyers, so why should MT judges have this restriction?

SB 397 Enact a judicial over-ride – If the legislature can be over-ridden (by a Governor's veto; or a court-ruling), and the Governor can be over-ridden (by 2/3 of the legislature; or a court-ruling); why should the judiciary be the only branch of government allowed to make dictatorial laws with no checks and balances? This bill doesn't even go far enough to create a level playing field, it simply allows the legislative branch and executive branch together to over-ride the judiciary with a combined veto – 2/3 of each legislative chamber PLUS the governor's concurrence.

SB 399 This bill applies Montana's open meeting law to the judiciary. The bill fleshes out the constitutional provision of Article II Section 9, regarding MT's open meeting law. And I've got an amendment to make the intent of this bill clearer.

SB 400 Require that any lawsuits against the legislature be brought in the county of the House Speaker or Senate President. – Under the current system, certain lawsuits of general state interest must be brought in Lewis & Clark County. This system is unfair because only citizens of the First Judicial District get to vote for these judges. It probably is unconstitutional also, under the U.S. Constitution's "One Person One Vote" requirement. Thus, citizens in the Helena area get to vote on judges who decide important cases of statewide interest, while voters in Great Falls, Billings, Bozeman are disenfranchised. This bill would at least partially correct this unfortunate situation. If power to overturn MT's legislature must be vested in a single judge—at least that judge should come from a part of the state which perhaps best represents a cross section of MT's population. The judicial districts containing the current Senate President or House Speaker (both Democrats, by the way) might best reflect that perspective.

In the interest of full disclosure, I need to make the committee aware that I'll have a separate hearing in State Admin Committee this afternoon where I'll present 4 additional court reform bills:

SB 393 Judges must declare a party designation when running for office. People should know beforehand the political inclinations of those who will be legislating laws they must live with. This bill adopts a system that existed in another state for many years at a time when that state was generally conceded to have the finest judicial system in the country. It allows that one

SB 395 MT Supreme Court judges should be elected from 7 different districts across MT. "Legislators" must represent a cross-section of the entire state. It shouldn't be permissible for all 7 judges to reflect a distorted "inside-the-beltway" (Helena) mentality, or even that they all come from "big-city" backgrounds.

SB 396 Set Supreme Court campaign contribution limits at the same level as legislature contribution limits; with third party expenditures also limited to $1300. This will ensure that elections are controlled by average citizens, not by the financial clout of special interests who have a vested interest in judge elections. It isn't right that someone with a vested interest can dump $50,000 or $20,000 into an election and buy a judge.

SB 398 Fix MT's recall law and impeachment law so that judge's and other politicians can be recalled for actions which violate the trust of the people they supposedly represent. Presently MT's recall law has been gutted by judges so the people have no real recourse.

Is enactment of all these restraints too burdensome on the Court? I ask you to notice that we elected legislators labor and do our jobs under virtually every single one of these restraints. But contrary to erroneous news stories, I have never said I wanted every one of these restraints placed upon the Court. I've said, and say again today, that I believe this body should consider these bills as a menu of choices; and that we should at least enact some of these sideboards.

That having been said, I ask committee members to not too hastily vote against any of these bills in hopes of passing what you view is the singular best option. I brought these bills all at once to save the committee, and the judges, and the public time and expense having to attend 10 repeat performances; but I also recognize that bringing them all at once diminishes the chances that any might pass. As the good Senator Bob Story has said, "If you have more than one boat in the water, the rats tend to jump ship." By having more than one option for you to choose from, I reduce the chances of any one particular bill receiving a majority vote. With that in mind I request the committee's indulgence to consider keeping as many of these bills alive as possible. So that we might have a full, robust discussion of this issue on the Senate floor. I also need to point out that several of these bills are constitutional referenda; and that I'm really asking this committee to give the voters of Montana a chance to vote on some of these reforms; and I trust MT voters to do the right thing.

Before closing, I need to quickly mention and respond to the criticisms I've received for bringing these bills. Many have said I'm wasting time trying to change the Court when I should be focusing attention on fixing MT's economy. One email wrote, "Work to give people good paying jobs… Don't fiddle your time away attacking the Supreme Court, there are bigger problems in Montana." I understand that sentiment; and my colleagues know that I've focused much of my legislative career on economic issues. But I think few people understand how a runaway Court so seriously hurts MT's economy and wage growth. Businesses take their jobs and leave MT when our Court over-reaches its authority. Again, you don't have to believe me. My colleagues in this legislature know my devotion to economic research and my devotion to attempting to improve MT's languishing wages. One international study by economists Lars Feld and Stefan Voigt is entitled ***"Economic Growth and the Rule of Law: Cross Country Evidence"***[xi]. This study concludes that a consistent rule of law (rather than inconsistent rule of lawyers) is one of the strongest factors leading to economic growth.

I believe it is no matter of mere coincidence that the acceleration of MT's wage slide (relative to other states) coincided with the Court's activist application of MT's "progressive" 1972 Constitution. Economist Frederic Bastiat pointed out that while often the initial consequence of a government action is good; there are usually secondary consequences of that government action which are almost always bad[xii]. While my friends on the political left may be content with the benevolent dictatorial actions of this Court, I would suggest that the secondary consequences of those actions is a languishing state economy that resulted in the nation's lowest wages -- *hurting the very low income people which this Court ostensibly wants to help.*

In addition to the Feld & Voidt study, I invite the committee to consider this statement by Professor Andrew Morriss. Professor Morriss is a nationally-respected law professor and economist at one of the nation's finest law schools. Although based in Ohio, he has published extensively on Montana law and legal history in the Montana Law Review and other publications. He is a completely impartial observer, who certainly has no axe to grind against the Montana Supreme Court. Here's what he wrote about the court:

"… in the recent decisions of the Montana Supreme Court is an unprecedented power grab… that threatens every Montanan's basic rights. If not reversed, these decisions will drive jobs and investment out of Montana…"[xiii]

Now let me wrap this up. As you listen to the fleet of trial lawyers opposing any and all of these Court reforms; I request that you not let opponents sidetrack you with trivial "devil in the details" arguments. I'm open to any and all amendments which will make these bills workable. In summary:

Democratic President Woodrow Wilson once said:

*"The history of liberty is a history of the limitation of government power, not the increase of it. When we resist, therefore, the **concentration of power**, we are resisting the process of death, because **concentration of power** is what always precedes the destruction of human liberties."*[xiv]

I ask you, Sen. Laslovich… you will soon pass the Bar exam and become one of the special class with the privileged potential to sit on this Court someday. You will be here after the rest of us are long gone; do you not see a longterm danger in where we're headed?

I ask you Sen. Cromley, you're already part of that special class; do you not see a danger that the citizen's legislature is relegated increasingly to the irrelevant corner of bureaucratic minutia; simply coming up with mindless regulations to implement the court's dictates?

I ask you, Sen. Wheat, you too are of that special class; do you not see a danger when the rights of the individual are so suppressed in favor of the will of the collective?

I ask you Sen. Ellingson, one of those with the privileged potential to one day serve on the Court. You have said, "An independent court is key to the balance of powers". Do you not see a danger that a Court unrestrained by historical jurisprudence can become overbearing, as Jefferson predicted, *"until it shall render powerless the checks of one branch over the other and will become as venal and oppressive as the government from which we separated?"*

I ask you Sen. Schockley, even though you're not quite as privileged as the rest of them (joke), do you not perceive that as the power and expansiveness of the Court increases exponentially, you're ability to serve and represent Ravalli County diminishes accordingly?

The question before us is this – whether we as Montanans pass on to our children the same system of limited 3 branch government with checks and balances that was handed down to us from our forefathers; or whether Montana continues down the road of benevolent dictatorship – an omnipotent judicial oligarchy with an executive branch and legislature relegated to meaningless bureaucratic trivialism.

Mr. Chairman, members of the Committee, I have copies of my testimony , including footnotes to verify my sources, I ask that it be entered in the record; and I reserve the right to close.

---

[i] Lord Acton, 1834-1902, Professor of Modern History, Cambridge University; Essay on Liberty.

[ii] Armstrong vs. State of Montana, Nelson

[iii] Such as in MEIC vs. Dept. of Environmental Quality, 1999, Trieweiler, where the Court pontificated expansively about the private sector duty to provide a "clean and healthful environment" (Article IX), when the case at hand was dealing with public sector State actions (Article II).

[iv] As cited in "The Supremes", *Missoulian* article by Michael Moore, 2000; p21 of 26.

[v] As cited by *Citizens for the Rule of Law*, Missoula MT, 2002.

[vi] See *Marshall, et.al. vs. State of Montana & Balyeat,* Feb 24, 1999, Leaphart; where no standing was required and no prior evidentiary hearing was even held.

[vii] *The Supremes*, op.cit., p10 of 26.

[viii] Ibid. p 2 of 26.

[ix] *1984*, George Orwell, published 1948; See Chapter 2.

[x] Marshall, et.al.; op.cit.

[xi] *Economic Growth and the Rule of Law: Cross Country Evidence Using a New Set of Indicators*, Lars Feld, Stefan Voigt (with James Gwartney); 2001.

[xii] *That Which is Seen, and That Which is Not Seen*, Frederic Bastiat, see online at http://www.freedomsnest.com/bastiat.html, p1.

[xiii] Essay on the Montana Court decision in MEIC vs. DEQ, Missoulian, 1999.

[xiv] Woodrow Wilson, as quoted in *Christian Standard*, Sept 12, 1976; p.10.