

Montana State Senate



The Treasure State

SENATOR JASON ELLSWORTH
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Honorable Justice Mike McGrath
Honorable Justice Jim Rice
Honorable Justice Laurie McKinnon
Honorable Justice Ingrid Gustafson
Clerk of Court Bowen Greenwood
Secretary Shelly Smith

Honorable Justice Beth Baker
Honorable Justice James Shea
Honorable Justice Dirk Sandefur
Honorable Judge Mike Menahan
Court Administrator Beth McLaughlin

Your honors, Clerk of Court, and staff:

July 29, 2024

During recent discussions between members of this Committee, questions have arisen about how the judicial branch handles the appointment of retired judges to hear cases and otherwise assist the courts. We are aware that Montana Code Annotated 19-5-103 provides that the Chief Justice can call retired judges to duty. Additionally, the Montana Supreme Court has interpreted Article VII, Section 6(3) of the Montana Constitution to allow for the appointment of retired judges by the Chief Justice (*Capital One, NA v. Guthrie*).

In a rural state with a limited pool of judicial officers, we understand how the ability to appoint retired judges to hear cases may be beneficial. However, we are concerned by the apparent lack of direction provided by statute or regulation to ensure proper oversight. By our reading, the selection, duties and supervision of retired judges appears to be at the sole discretion of a single individual, the Chief Justice, with no additional checks and balances governing the process.

Our first concern is that once a judge retires, he or she is no longer accountable to the people through the electoral process. The judge is not chosen to fill the vacancy by the people, but by the Chief Justice. The judge is eligible for this appointment based on past service, which may have ended last week or decades ago. Yet, the decisions handed down by the appointed judge may impact Montana far into the future.

As you are aware, home prices in Montana have increased 105% since 2017, rental rates in many communities have climbed by double digits, and the rate of homelessness continues to rise. In the 2023 session, a bipartisan group of legislators came together to address this crisis by passing the "Montana Miracle," a package of bipartisan pro-housing laws designed to increase the supply of affordable housing. Yet, important parts of this legislation are currently blocked from implementation by a ruling handed down by retired Gallatin County judge Michael Salvagni.

The legislation imperiled by his decision was thoughtfully drafted, vetted through a public process, debated on the floors of both chambers, and passed by a recently-elected group of bipartisan legislators. In contrast, retired judge Salvagni was last subject to a vote of the people a decade ago, retired eight years ago, and is accountable to just one person, the Chief

Justice. There is no way for the public, who are deeply impacted by his ruling, to hold him accountable for it.

The appointment of a retired judge to fill a vacancy may sometimes be necessary, but recently, has become more common. The legislature is working with the judicial branch to improve staffing levels in our courts, but we would be remiss if we did not consider what sideboards may be necessary to ensure that retired judges are subject to the same oversight and accountability as their elected counterparts.

Further, our generalized concern over the use of retired judges has become more acute following five recent events involving former members of the judicial branch ranging from unbecoming, to distasteful, to vile. We are concerned that retired judges who have pierced the veil of the judiciary by committing malfeasance, participating in active litigation, and engaging in violent political rhetoric may once again be selected to preside over cases and controversies.

Judge Kim Christopher

As you are aware, this spring, Lake County judge Kim Christopher [resigned under a cloud of controversy](#). Attorneys and litigants who appeared in her court have made credible allegations of bias, misconduct, and abuse of power, while the Montana Supreme Court called her decision in a recent child custody matter a ‘gross injustice’ that harmed a vulnerable 5-year-old. Given that she had already filed for re-election at the time of her resignation, it feels to many that she likely resigned in lieu of discipline.

However, due to her retirement, the voters will never be offered the opportunity to weigh and measure the veracity of the allegations against her. Troublingly, due to her retirement, the Judicial Standards Commission will not hear or rule upon complaints filed against her or address the allegations of misconduct. Instead, she will retire, frozen in good standing, eligible to hear cases again if called upon by the Chief Justice.

Judge Ray Dayton

In 2024, Anaconda-Deer Lodge County judge Ray Dayton was suspended without pay by the Montana Supreme Court for making inappropriate sexual comments about individuals involved in a case he was deciding. Shortly after news of his misconduct and punishment became public, Judge Dayton chose to not stand for re-election. He will retire at the end of the year, and nothing that we can find in statute or regulation would prevent him from being selected by the Chief Justice to hear future cases, despite this misconduct.

Judge Michael Moses

As you know, *Marquez v. State of Montana*, a high-profile case regarding the changing of gender on a birth certificate after issuance, is currently pending before the Montana Supreme Court. During the 2024 Bench Bar Continuing Legal Education, retired Judge Michael Moses, who presided over *Marquez* at the district court level, commented negatively about counsel for the State and expressed his beliefs about a central issue in the case. It is highly objectionable for a presiding judge to comment on still-pending litigation, but his comments crossed the line into ex parte communication, as defined by the American Bar Association Rule 2.9, when he made them in the presence of Justice Laurie McKinnon, who is currently seated on the Montana Supreme Court panel reviewing his rulings in *Marquez*.

Despite the Attorney General's vigorous objection to Judge Moses' actions and [his request](#) that Justice McKinnon be removed from the *Marquez* panel given that she permitted comments on pending litigation to occur, retired Judge Moses was not reprimanded and is free to be called upon to hear cases at the will of the Chief Justice. This is despite the fact that a lobbyist for the State Bar testified to our Senate Select Committee that the Bar apologized to the Governor for the inappropriate comments made by Judge Moses and others. We are concerned that bad conduct that occurs in full view of the public, imperiling the appearance of unbiased justice, is only apologized for in private (if at all) instead of being publicly rebuked.

Six Retired Justices Appear as Amici in a High Profile Case

Justices James C. Nelson, Terry N. Trieweiler, William Leaphart, James M. Regnier, Patricia O. Cotter, and Michael Wheat are appearing in *Held v. Montana* as active litigants [via an amicus brief](#). Having six former Montana Supreme Court justices lobbying the current Court on a major, controversial constitutional case is unusual and unbecoming for the appearance of bias in Montana's courts.

Currently-serving judges and judicial candidates are expected to refrain from commenting on active litigation, so to file arguments in an active matter, and have them accepted by the Montana Supreme Court, feels distasteful. Yet, despite using the halo of being retired judges to burnish their passionate arguments in favor of the *Held* plaintiffs, any or all of these six jurists could be called upon at any time to sit in judgment on future cases.

Justice James Nelson

For a few years now, former Justice James Nelson has plied his trade as a political pundit in several Montana papers. He comments on pending legislation, liberally shares his opinions about current elected officials, and speaks freely about active litigation. Some of his recent rhetoric has crossed the line from passionate to incendiary.

On March 15, 2023, during the legislative session, Nelson stood in front of a crowd in the Capitol Rotunda, mere steps away from lawmakers, and [gave a speech](#) in which he said "Make no mistake, this challenge is, and will continue to be a fight, indeed a *fight to the death* against the jihad focused on our third branch of government. A war perpetrated by the supermajority, Freedom Caucus, the Legislature, the Governor, and the Attorney General." (emphasis added)

Legislative leadership in both the House and Senate condemned his remarks at the time, but the judicial branch did not admonish his rhetoric or state that he would no longer be eligible to hear cases in his capacity as a retired jurist if they involved the people and entities he publicly called jihadists.

On July 22, 2024, Justice Nelson published [a news column in the Missoula Current](#) condoning the attempted assassination of Donald Trump, writing, in relevant parts, "...my first thought was that Trump's chickens were finally coming home to roost. The former President was finally reaping what he had sown...And, now, as a result of the failed assassination, Mr. Trump is a star: the victim, the martyr, the warrior, the fearless leader. . .Mr. Trump will probably be re-elected to fulfill his neo-Nazi, fascist promise to form a 'unified Reich,' arrogate all power unto himself, deport millions, and seek retribution against his enemies. Alas, sorry Mr. T, no thoughts and prayers from me. I hate gun violence of any kind, but know that being shot at was the blow-back from the bad karma that you've dumped on other people for years."

At a time when even former President Trump's most hardened enemies saw the attempt on his life as a reason to call for calm and toning down the rhetoric, Justice Nelson seemed to celebrate a near-miss political assassination as just comeuppance. His words were a repulsive feast on a political foe, and a tacit encouragement of the very gun violence he claims to abhor. Yet, again, no member of the judicial branch has spoken publicly in his rebuke, no complaint can be filed with the Judicial Standards Commission, and he remains eligible to hear cases tomorrow if the Chief Justice deems it necessary.

We are disturbed by the actions of these former jurists, but mostly we are gravely concerned that a system may proliferate that eschews accountability in favor of expediency. As we consider legislation to ensure proper checks and balances exist for the appointment, supervision, and oversight of retired judges, we ask that you formulate answers to the following questions about the current system:

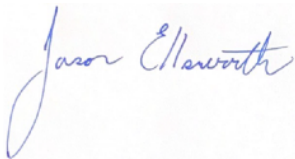
- What is the process the Chief Justices uses to determine if, when, and how to appoint a retired judge to oversee a case?
- Does the Chief Justice exercise unilateral authority and discretion in appointing retired judges, or is there some form of check and balance on that decision?
- Is there a list of retired judges who are available and authorized to be considered for temporary judicial service?
 - If so, are Justice Nelson, Judges Christopher, Dayton, and Moses, and Justices Trieweiler, Leaphart, Regnier, Cotter, and Wheat on that list?
- Do Justice Nelson's comments on waging a "fight to the death" with the Legislature, Governor, and Attorney General, as well as his news column condoning the attempted assassination of former President Donald Trump amount to conduct that is unbecoming of a judge, or otherwise fall short of expected judicial temperament within the Montana judicial branch?
 - Do these remarks display a temperament that would disqualify Justice Nelson from ever being called out of retirement to again serve as a judge?
 - Do you condone, condemn, or otherwise have an opinion on Justice Nelson's remarks toward Montana elected officials and the former president?
- Are potential violations of the Code of Judicial Conduct or potential bias by retired judges considered before appointing a retiree?
 - Do the Code of Judicial Conduct and ethical standards apply to retired judges? How and when? And if so, how would that be enforced if unofficial or official policy seems to be to dismiss complaints against retired judges?

- May the Chief Justice choose to appoint retired judges who have contributed to the Chief Justice's political campaign(s)?
- Alternatively, does a retiree making a political contribution to a Chief Justice effectively rule out that retiree from being called to serve, if the Chief Justice can't or won't appoint political donors?
- Can the Chief Justice recuse himself or herself from making the decision on who to appoint? If so, who would then make that decision in his stead?
- Is there any mechanism in place to inform the Chief Justice of Judicial Standards Commission complaints, Commission on Practice complaints, retirees' legal and/or political activities, etc., prior to him or her making a decision to appoint a retired judge to hear a case?
 - Are retirees' legal and/or political activities (such as appearing as *amici* or writing political newspaper columns) examined before deciding to appoint a retired judge?

We have addressed this letter to the group of you because we don't know who is best able to answer each of these questions. We request that each of you provide answers to the question(s) you are able to answer, in writing, by **12:00PM on Monday, August 12th**. Please specify which questions you are answering, which you do not have the information to provide an answer, and which you don't have an opinion on.

Responses may be emailed to Secretary of the Senate Marilyn Miller at marilyn.Miller@legmt.gov. Please also copy committee staff Rachel Weiss at rachel.Weiss@legmt.gov.

Sincerely,



Jason Ellsworth
President of the Senate

The Senate Select Committee on Judicial Oversight and Reform voted ___ to ___ to send this letter on July 29, 2024.