December 21, 2022

Senator Greg Hertz  
Chairman  
Select Committee on Judicial Accountability  
Montana State Capitol  
Helena, MT 59620

Re: Draft Final Committee Report

Dear Senator Hertz:

Please accept this letter as the Judicial Branch response to the Draft Final Committee Report released last week. While there are numerous inaccuracies and misstatements in the Report, this letter is not intended to respond to all of them.

The Report Repeats Old, Inaccurate, and Inappropriate Allegations

Initially, I want to express dismay at some of the language used in the Report. No one in the Judicial Branch—no justice, judge, or administrative staff—has lied or misled anyone regarding the issues raised in the Report. The lack of professionalism displayed here is astonishing and certainly does not comport with any sense of accepted legislative protocol. I am requesting that you correct the final version and delete the inappropriate personal allegations.

At its core, the Report contains no new information. It rehashes information that the Court replied to in person on April 19, 2021, and in my letter of April 30, 2021 (see Attachment 1, Response to Senator Hertz and Representative Vinton).

The Branch Has and Will Continue to Ethically Perform Its Duties

We agree with the opening statement that “The separation of powers among Montana’s legislative, executive, and judicial branches of government is essential to keep a government that is limited in its powers, secures the rights of Montanans, and treats everyone justly under the law.” As statewide elected officials, we take our responsibilities and our positions very seriously. We agree that Branch operations must be above reproach so that everyone in this state has faith in the fairness of our decisions.
An objective, non-political review of our activity during the 2021 legislative session clearly demonstrates our commitment to these ideals. It is entirely appropriate, and certainly not unethical, for judges to offer comments or suggestions regarding legislation that impacts, as a matter of policy, the Judicial Branch. Rule 3.2 of the Code of Judicial Conduct recognizes that judges may consult with legislative bodies “in connection with matters concerning the law, the legal system, or the administration of justice.” This has been the practice for decades, and I expect it will be common practice in the future.

Ironically, much of the Report is focused on an alleged bias of the Branch regarding SB 140—the bill that eliminated the Judicial Nomination Commission.

While it is true that a few judges, including myself, opposed the bill as a matter of public policy, Judge Krueger and I both recused ourselves from participating in any consideration of the legal challenge to the bill. And, as you know, the Montana Supreme Court found the statute to be constitutional (see Attachment 2, Brown v. Gianforte, 2021 MT 149, 404 Mont. 269, 488 P.3d 548). The new appointment process has been successfully implemented and the Governor has made several judicial appointments. It is pure fantasy to suggest that the Branch has behaved in an unfair or irresponsible manner regarding SB 140.

The Report also raises questions regarding the Supreme Court’s decision-making process in McLaughlin v. Mont. State Legislature, 2021 MT 178, 405 Mont. 1, 493 P.3d 980. Of course, as you are aware, the Attorney General pursued legal challenges to that process for two years, culminating in the United States Supreme Court refusing to review or interfere with the rulings of the Montana Supreme Court.

As to the Order issued by the Court on April 11, 2021, the Order was a Temporary Order to protect against the “substantial potential of the infliction of great harm if [the subpoenas to McLaughlin were] permitted to be executed as stated,” maintaining the status quo until a more thorough review could be undertaken and all interested parties had an opportunity to participate (see Attachment 3, Brown v. Gianforte, OP 21-0125 and OP 21-0173, 2021 Mont. LEXIS 356). Courts across the United States routinely issue temporary injunctions to preserve the status quo until all parties have the opportunity to be heard. That is what happened here. There was nothing unusual about the issuance of the Temporary Order in this instance.

As to the Court’s ruling on the question of judicial disqualification regarding the issues in McLaughlin, I refer you to the comprehensive Opinion and Order written by Justice McKinnon (see Attachment 4, McLaughlin v. Mont. State Legislature, 2021 MT 178, 405 Mont. 1, 493 P.3d 980). A litigant may not interfere with the adjudicatory process by unilaterally manufacturing a conflict against members of a court and the comment to
M. C. Jud. Cond. 2.12 specifically notes that the “rule of necessity may overrule the rule of disqualification.”

As I understand the Committee position, there would be no entity that could review Legislative Branch actions when an employee of the Judicial Branch is implicated. There would be no check on legislative power. This clearly is not consistent with the separation of powers doctrine, and courts across the country have repeatedly held otherwise.

**The Recommendations Repeat the Branch’s Preexisting Policies or Practices as Set Forth by the Montana Code of Judicial Conduct**

Many of the recommendations suggested in the Report are already implemented in the Code of Judicial Conduct, or have recently been adopted as Branch policy. M. C. Jud. Cond. 2.2 mandates that a judge avoid potential conflicts of interest, and Rule 2.11 requires a judge to refrain from comments that can be construed as an indication of bias or prejudice. Further, state law, in § 3-1-805, MCA, allows parties to file motions for disqualification in cases of perceived bias or prejudice and, significantly, allows them to substitute, without cause, a judge assigned to a case where they are a party. Section 3-1-804, MCA.

As noted in the Report, the Branch has recently adopted a formal e-mail policy and the Branch will continue to meet the requirements of Rule 3.2 in interacting with the Legislature on pending legislation that addresses policy matters affecting the Branch.

The Judicial Standards Commission is a constitutionally created commission with the responsibility to enforce the Code of Judicial Conduct. *See Mont. Const. Art. VII, § 11.* The Commission consists of five members, two of whom must be district court judges. The proceedings of the Commission are confidential. As a branch, we welcome traditional and productive forms of legislative oversight. For example, the Law and Justice Interim Committee recently conducted a study of the Commission and issued a report (*see Attachment 5, House Joint Resolution 40 Study Summary, 2021-2022*). Additionally, the Legislative Auditor is currently conducting a performance audit of the Commission.

We have fully cooperated with the Interim Committee and will fully cooperate with the Legislative Auditor.

For whatever reason, the Report fails to recognize the distinction between a judge’s comment on a policy issue before the Legislature and a comment on the legal merits of a particular case, including whether a bill would be constitutional. *Brown v. Gianforte* provides a perfect example. The Court agreed that SB 140 was constitutional irrespective of any issues regarding whether the bill was good public policy.
Retraction Demand

Finally, let me note my strong objection to the libelous accusations made in the Report regarding my veracity. Consider this as a formal request to remove them from the final version of the Report.

Thank you for the opportunity to file our objections to the draft Committee Report. We hope that, moving forward, we will be able to maintain a respectful and positive working relationship between the branches of government during the legislative session.

Sincerely,

Mike McGrath
Chief Justice

c: Sen. Jason Ellsworth, President Elect (with attachments)
   Rep. Sue Vinton, Vice Chair (with attachments)
   Rep. Matt Regier, Speaker Elect (with attachments)
   Members of Select Committee
   Beth McLaughlin, Court Administrator
   Supreme Court Justices
   District Court Judges
   Randy Cox, Attorney at Law