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September 19, 2016

Bob Ferguson
Attorney General
The State of Washington
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Re: Washington State Supreme Court, Separation of Powers

Dear Attorney General Ferguson:

My name is Stephen Kerr Eugster. I am a member of the Washington State Bar Association # 2003. I am admitted to the bar of the Washington State Supreme Court (Supreme Court).[1]

Along with my fellow members of the bar of the Supreme Court, I have special responsibilities**:**

> **A lawyer, as a member of the legal profession, is a representative of clients, an officer of the court and a public citizen having special responsibility for the quality of justice.**

Rules of Professional Conduct, *Preamble: A Lawyer's Responsibilities* (emphasis added).

I have practiced law in the State of Washington since the fall of 1970. I am a graduate of the University of Washington School of Law, J.D. 1969, where I was

[1] I am proud of having been sworn into the bar of the Supreme Court at the United States Supreme Court in January 1970 by United States Supreme Court Associate Justice William O. Douglas, of Yakima, Washington.

on the Washington Law Review, and for a year, the Review's Managing Editor. I graduated with honors and as a member of the Order of the Coif.

I have appeared before the Washington Supreme Court and the Washington Court of Appeals in numerous cases.

My first cases before the Supreme Court involved the constitutionality of Initiative 276 *circa* 1973-74. Richard A. Derham, and I, of Davis, Wright, Todd, Riese & Jones, Seattle, represented William J. Fritz, a lobbyist, and others in several cases. *Fritz v. Gorton*, 83 Wash.2d 275, 517 P.2d 911 (1974) and *Bare v. Gorton*, 84 Wash.2d 380,526 P.2d 379, (1974) (Mrs. Mildred E. Bare was a school board member).

Since then, many my cases before the Supreme Court and the Court of Appeals have involved the meaning and application of the Washington State Constitution.

I am a taxpayer of State of Washington and have been so since 1966, the year of my residency in the state. For the last thirty-nine years, since my residence in Spokane County, I have paid sales taxes, use taxes, and property taxes, etc., to the State of Washington. I am paying such taxes now and will do so in the future.

Over the past several years I have been studying what we refer to today as the Washington School Funding Cases. I have expended much time and energy studying and considering *McCleary v. State*, 269 P.3d 227, 173 Wash.2d 477, 276 Ed. Law Rep. 1011 (Wash., 2012). I have followed the activities and actions of the Legislature and the Supreme Court concerning the "enforcement the *McCleary* decision."

A major concern of mine over the years since the *McCleary* decision is the question of whether the Justices of the Supreme Court have violated, or are presently violating, the basic constitutional premise of the Washington State Constitution – separation of powers.

> **Our system of checks and balances incorporates the important concept of the separation of powers. *Hale v. Wellpinit Sch. Dist. No.* 49, 165 Wash.2d 494, 503, 506, 198 P.3d 1021 (2009). The doctrine "preserves the constitutional division between the three branches of government, ensuring that the activity of one does not threaten or invade the prerogatives of another." *State v. Elmore*, 154 Wash.App. 885, 905, 228 P.3d 760 (2010). The legislature violates separation of powers principles when it infringes on a judicial function. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wash.2d 107, 143, 744 P.2d 1032, 750 P.2d 254 (1987). The function of the judiciary is to say what the**

> **law is, whereas the legislature's function is to set policy and draft and enact law. *Hale*, 165 Wash.2d at 506, 198 P.3d 1021. It is important to note that although the separate and coequal branches fill different roles, the branches "must remain partially intertwined to maintain an effective system of checks and balances. The art of good government requires cooperation and flexibility among the branches." *Id.* at 507, 198 P.3d 1021.**

Hambleton v. State (In re Estate of Hambleton), 181 Wash.2d 802, ¶ 27, 335 P.3d 398 (Wash., 2014).

At first, I was sure the decision itself was a violation of separation of powers. The more I studied the matter, I came to respect what Justice Tom Chambers, deceased, said about the decision on his internet website. He said:

> **[1] In 2005, the legislature initiated a new study called Washington Learns. Washington Learns noted that "[t]oday, the K-12 education system is still financed by the thirty-year-old statutory formula of the Basic Education Act." *McCleary v. State*, 173 Wn.2d 477 (2012).**
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> **[2] The report found that, despite the shift to a performance-based system more than a decade earlier, "the funding model for K-12 education has not been updated to reflect the new expectations and has not addressed the question of how to use resources most effectively in order to improve student outcomes." Id. The report further surmised that "[s]table and significantly increased funding is required to support the evolving needs of our education system." Washington Learns concluded that the State was not meeting its duty to provide adequate funding in many areas. In response to Washington Learns, the legislature adopted ESHB 2261, a comprehensive approach to adopting reforms and to provide adequate funding for basic education. The plan was to phase in funding so that basic education would be fully funded by 2018.http://apps.leg.wa.gov/documents/billdocs/200910/Pdf/Bills/-Session%20Laws/House/2261-S.SL.pdf. But instead of funding the improvements the legislature had adopted to provide adequate funding of education in ESHB 2261, the legislature began reducing funding to schools.**
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> **[3] A group of school districts, individuals, and community members brought the *McCleary* lawsuit claiming the State was not fulfilling its constitutional mandate. The lawsuit proceeded to trial and, as in the 1978 case, the trial judge found that the State was not meeting its duty to adequately fund basic education. The Washington Supreme Court agreed and has given the State until 2018 to fully fund basic education. It is not the court's role to decide how to adequately fund basic education. But it is the court's role to interpret the state constitution. From a constitutional analysis point of view, this is not rocket science. It is fundamental that the legislature must first fund all constitutionally required functions before funding non-mandated**

> **programs. The paramount duty clause means education must be the State's highest priority. The founders used the word "ample" which has reasonably been interpreted to mean the State must adequately fund education over all other state funded programs. Inasmuch as it was the legislature's plan to adequately fund basic education by adopting ESHB 2261, the court is using the legislature's own plan as a benchmark to measure progress. [Emphasis added.]**[2]

See ESHB 2261.

In essence, Justice Chambers did not believe the Court, in deciding *McCleary*, was violating the separation of powers doctrine -- was legislating, because the "court [was] using the legislature's own plan as a benchmark to measure progress." Id.

Over the past four years, the Supreme Court has tried to enforce its decision against the State.[3] During this time, Court never worked from a decision which was objectively quantified. The court did not say what would satisfy its desire to fund education adequately. The essence of the various contempt orders was that the Legislature was not doing what the Court wanted the State to do to; not any time did the Court issue a contempt order which was based on a specific, quantifiable object the State was to fulfill.

The Court wanted to have the legislature come up with legislation satisfying the unquantified demands of the Court. The Court was legislating in that it wanted the State to legislate. It held the power to determine whether the State's legislation was the legislation the Court wanted. The Court created in itself an **ultimate plenary power to veto** legislation of the State which did not fulfill the ever-shifting and unquantified desires of the Court.[4]

In my opinion, this was, and is, a violation of the separation of powers doctrine:

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[2] http://tomchambers.com/the-states-duty-to-pay-for-education/.

[3] The State is the only defendant in the case. The Governor and the Legislature are not parties. The individual members of the Legislature are not parties.

[4] The state would be well on its way now to better school funding had private individuals with standing commenced a writ of mandamus action in a Supreme Court case naming the individual state legislators and the governor as party defendants -- individuals over whom the Court had jurisdiction over (personal jurisdiction). If such a case had been brought at the time *McCleary* was decided in December 1982, the Court would have quantified the amount of money needed to be appropriated by the Legislature and approved by the Governor to fund ESHB 2261 the legislation the Court determined would take care of the problem. (See discussion of Justice Tom Chambers view above.) This case would have been brought directly in the Supreme Court. The Court has original jurisdiction over mandamus cases against state officers. WASH. CONST. Art IV, Section 4. ("The supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers, . . . "). I presume members of the house of representatives, and senators are "state officers." *See* WASH. CONST. Art. II, Section 4, and Section 6.

the court is clearly legislating.

The actions by the justices of the court are unconstitutional.

By this letter, I request that you and your office take immediate steps to ensure that the Justices of the Supreme Court are not acting in violation of the separation of powers doctrine.

I make this request because I am a citizen of the state. I have taxpayer standing to litigate the issues if you do not. And, as a member of the bar of the Washington State Supreme Court, I am "an officer of the court and a public citizen. having special responsibility for the quality of justice." [Emphasis added.] [5]

Some may say "what is the point, the Supreme Court is going to make its own decision on the matters. The Supreme Court is going to make the decision; that is certain. But, as we know, in circumstances like this, qualified persons will be selected to act as justices of the Court in the cases.[6]

As you know, your response decision not to respond, or your failure to respond is a step which precedes my power to act in these matters on my own.[7]

Respectfully,

/s/ Stephen Kerr Eugster

Stephen Kerr Eugster

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[5] Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities [1].

[6] WASH. CONST. Art. IV, Section 2(a):

> TEMPORARY PERFORMANCE OF JUDICIAL DUTIES. When necessary for the prompt and orderly administration of justice a majority of the Supreme Court is empowered to authorize judges or retired judges of courts of record of this state, to perform, temporarily, judicial duties in the Supreme Court, and to authorize any superior court judge to perform judicial duties in any superior court of this state.

See, e.g., *In the Matter of the Disciplinary Proceeding Against Richard B. Sanders, Justice of the Supreme Court of the State of Washington*, 135 Wash.2d 175, 955 P.2d 369 (1998).

[7] See *Friends of N. Spokane Cnty. Parks v. Spokane Cnty.*, 184 Wash.App. 105, 336 P.3d 632 (Wash. App., 2014); *State ex rel. Boyles v. Whatcom County Superior Court*, 694 P.2d 27, 103 Wn.2d 610 (Wash., 1985).

cc: Justices of the Washington Supreme Court, namely; Chief Justice Barbara A. Madsen, and Justices Charles W. Johnson, Susan Owens, Mary E. Fairhurst, Debra L. Stephens, Charles K. Wiggins, Steven C. González, Sheryl Gordon McCloud and Mary I. Yu,

Jay Inslee, Governor, and

Members of the Legislature