Opinion

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OUR VIEW

PERS reform still vital

The state pension system is the toughest challenge Oregon faces that our leaders in Salem are likely to diligently avoid.

The $24 billion debt of the Public Employees Retirement System is complicated. It is paid off in some abstract future. Taxpayers don't feel the impact of it very directly. And there's no way to fix it without making taxpayers and people who get the pensions unhappy. So lawmakers in Salem and governors have been dodging reforms.

There have been notable exceptions, of course. State Sen. Tim Knopp, R-Bend, has consistently tried to compel his fellow legislators to take on PERS.

Also, the 2019 reform by the 2019 Legislature and signed by Gov. Kate Brown was worth admiring. It put off payments of the debt more than cut costs. Still, the state's leadership did something. Democratic lawmakers, in particular, have taken considerable heat from unions for voting for the bill. Unions have said they won't be making contributions to some political campaigns because of it.

Now there's a new danger that the state's leadership will lapse back into its diligent efforts to avoid PERS challenges. 2019 was a good year for PERS, as The Oregonian's Ted Sickinger reported. Investment returns came in at just over 12%. Other forms of investment also showed improvement. The end result is that the $27 billion PERS future liability may only be a $24 billion future liability.

The reduction in liability can make a big difference in budgets — of everything from state government to school districts like Bend-La Pine or towns like Madras. When the liability goes down, so does the money government employers have to pay into PERS to cover the future liability of the retirement costs of their workers. In schools, when districts have to pay more to cover PERS they can't use that money to hire more teachers or buy new computers. Across PERS, "employers are paying an average base pension contribution rate of about 25% of payroll and about 18% of payroll after they receive rate offsets from any side accounts," The Oregonian reported. Because, in part, of the reduction in the liability, those contribution rates may not have to climb in 2021.

That's great news. It doesn't mean PERS is not a big deal, anymore. Investment returns don't always behave in a way that helps PERS. Oregon will still have a huge unfunded debt that many of our state leaders would rather not talk about.

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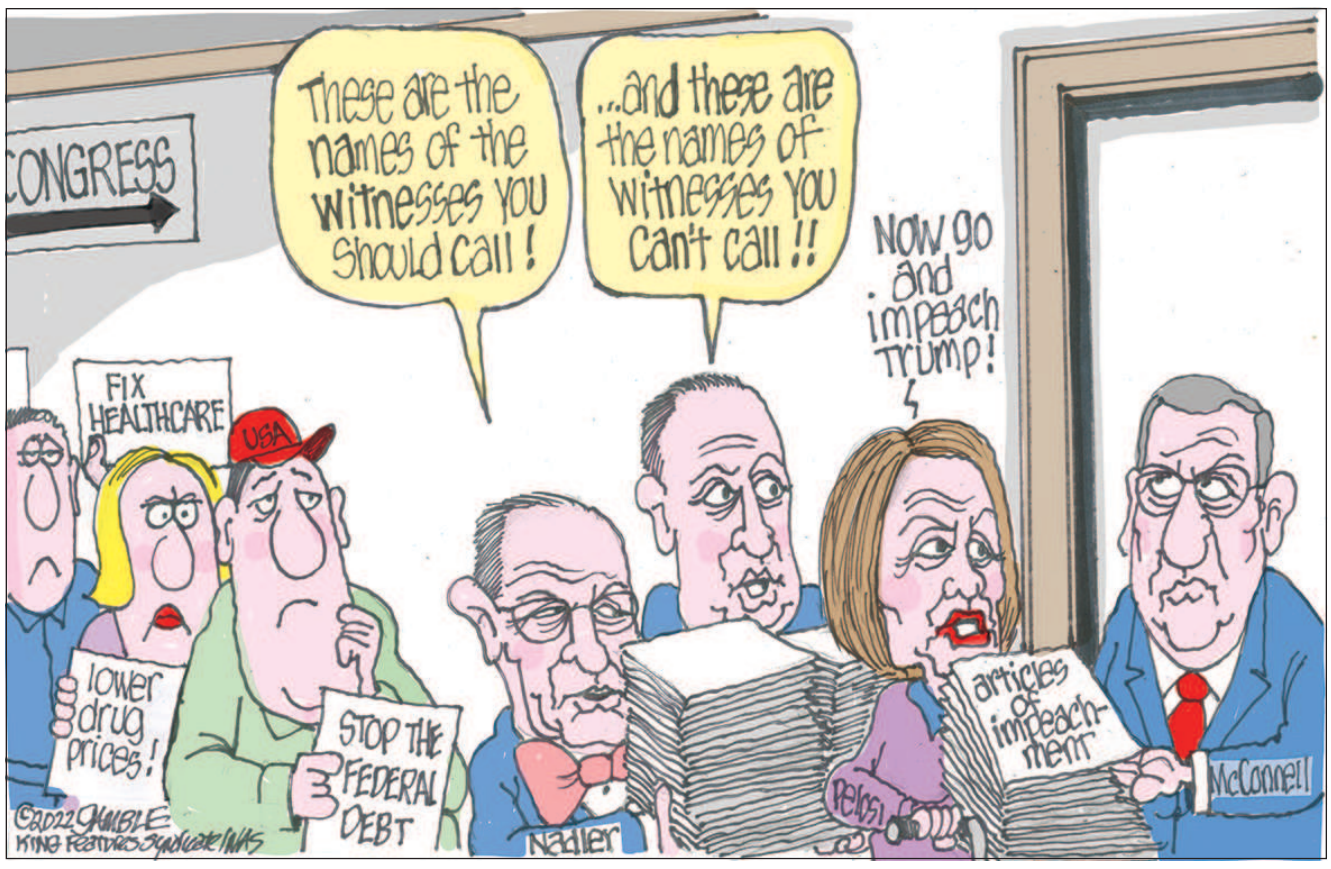

Attorney general as president's 'wingman' a longstanding role

JOSH HAMMER

Many have been all too quick to make Attorney General William Barr out to be a reflexive toady for President Trump. Just last week, the New York City Bar Association took the extreme step of writing to congressional leaders to investigate Barr for political bias. And last month, he came under blistering criticism for defending the Trump campaign and characterizing the FBI's Russia investigation into the 2016 election as bogus.

Slate has accused Barr of using the Department of Justice as "a personal law firm for Trump." Vox has bewailed "the department's politicization under Barr." The Daily Beast has lamented how Barr has "become another of Donald Trump's personal lawyers." The New York Times has noted that the attorney general had "reprised his role as a vocal defender of President Trump."

Perhaps none of these media outlets recall the time when then-Attorney General Eric H. Holder Jr. famously described himself as President Obama's "wingman." Curiously, Holder actually took to the Washington Post to decry Barr's ostensible self-debasement as an unfortunate "instrument of politics."

Holder's hypocrisy aside, the new stance in favor of a strongly independent attorney general among liberals is misguided as a matter of constitutional interpretation and ahistorical as a matter of American custom.

Article II, Section 1, Clause 1 of the Constitution states that "(t)he executive Power shall be vested in a President of the United States of America." The power is vested not in numerous sources, but solely in the president. The president maintains plenary authority over the entirety of the executive branch.

The "unitary executive theory," which Democrats routinely excoriate, comes from the plain text of the Constitution. As Barr recently said during his remarks at the Federalist Society's 2019 National Lawyers Convention, the notion of the unitary executive "is not 'new,' and it is not a 'theory.'" On the contrary, he continued, "(i)t is a description of what the Framers unquestionably did in Article II of the Constitution."

Throughout American history, attorneys general have intuited and acted upon their nonindependent subordination to presidents of the United States. In "Conflicting Loyalties: Law and Politics in the Attorney General's Office, 1789-1990," the scholar Nancy V. Baker explored the historical nature of the attorney general's position. Baker devoted entire book sections to "The Attorney General as a Legal Advisor" and "The Attorney General as a Policy Advisor." She observed that "before he became an administrator" of a sprawling Department of Justice bureaucracy, "the attorney general assumed the role of the advisor to the president." What's more, the attorney general's "responsibility" to serve in such an advisory capacity "has antecedents in seventeenth-century England."

Indeed, the role of the attorney general as a top presidential adviser has been a recurring theme throughout American history. When President Lincoln's attorney general, Edward Bates, famously wrote to Congress in 1861 to defend Lincoln's unilateral suspension of the writ of habeas corpus, he did so not as a neutral arbiter of legal principle, but as Lincoln's top legal adviser who shared his superior's ultimate policy aim of a Union victory in the Civil War.

Similarly, President Franklin Roosevelt's wartime attorney general, Francis Biddle, ceased his vocal opposition to Japanese American internment after it became obvious that Roosevelt planned to sign the fateful Executive Order 9066. Biddle understood that he was not in any way independent of the president, but that he was a political appointee who had to support the president in order to keep his job.

In modern times, the Justice Department's Office of Legal Counsel, which was created by Congress during the New Deal, provides "legal advice to the president and all executive branch agencies" and reviews "all executive orders and substantive proclamations proposed to be issued by the president." The president also has at his disposal the White House counsel's office, but that office tends to focus on legal issues arising from legislation, executive and judicial branch nominations and ethics questions.

Though the Office of Legal Counsel does sometimes reach legal conclusions at loggerheads with the White House, it is hardly independent in any meaningful way. Former Acting Assistant Attorney General David Barron, who led the OLC during the early years of the Obama administration, once stated that the office's legal analyses "may appropriately reflect the fact that its responsibilities also include facilitating the work of the Executive Branch and the objectives of the President, consistent with the law." And legal scholarship has observed the "systematic deference" that the Office of Legal Counsel generally shows toward the president's prerogatives.

Eric Holder was correct the first time. The attorney general, in large part, actually is the president's "wingman."

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GUEST EDITORIAL

Waiting game on Affordable Care Act is not healthy

Editorial from Minneapolis Star-Tribune

Patients, seniors, doctors, hospitals, state lawmakers and voters are owed a swift answer from the U.S. Supreme Court about whether the Affordable Care Act will survive the latest legal challenge to its existence. The court needs to remove the uncertainty hovering ominously over this landmark measure, one whose sprawling web of assistance consumers, hospitals and states have come to rely on for quality, accessible care.

That the fate of the 2010 law is dependent on the courts for the third time in a decade is exasperating. Twice already, battles over the ACA's constitutionality have been fought all the way to the Supreme Court. Twice, justices there have upheld the law. Now, a third challenge, one that's essentially a vanity project led by a headline-seeking Texas attorney general, is gaining ill-deserved momentum.

The legal argument in this dubious Texas lawsuit is the flip side of the original 2012 Supreme Court challenge to the law. Back then, the ACA's earliest opponents argued that the law was unconstitutional because it required people to buy insurance. The Texas AG now argues that the law is unconstitutional because Congress essentially gutted the purchase requirement in 2017 during an end-of-the year tax bill.

A U.S. District Court judge in Texas somehow was blinded to the irony of this argument and ruled in the Texas AG's favor. Last month, a 5th Circuit Court of Appeals panel essentially agreed with the lower court. In a 2-1 ruling, the justices decided to send the case back to the lower court to decide which parts of the law, if any, could be left intact. Minnesota is one of more than a dozen states that have filed a motion with the Supreme Court to review the case before the lower court acts.

The implications are enormous. Millions of Americans depend on the financial aid the law provides to buy private insurance. In Minnesota, the average household that applied for help through MNsure received $5,244 to buy coverage in 2020. That aid could be gone next year or in the future. The fate of the Medicare "doughnut hole" is equally uncertain, leaving seniors with frightening questions about how they'll be able to afford medications.

The questions about the law's future are also an absolute nightmare for lawmakers. One of the ACA's pillars involved expanding access to state-run public medical assistance programs, with the federal government picking up most of the tab. In Minnesota, that allowed the state to cover an additional 209,000 people. Federal dollars available through the ACA's "Basic Health Plan" program also allowed officials to bolster MinnesotaCare benefits and significantly offset the state's financial responsibility for this program.

Lawmakers in Minnesota and elsewhere will have to make decisions about the future financing of these vital medical assistance programs, potentially without the generous flow of federal aid that has supported them thanks to the ACA. They need answers now from the Supreme Court about the law's future, not at some point as the case wends its way though the system. The court's obligation to consumers is even greater. If the Texas-led suit nullifies benefits that up to 20 million people now rely on, the nation needs to know now so it can prepare to mitigate the damage. Voters this election year also should hear what plans candidates have if the ACA is struck down.

"When I voted for the ACA in Congress 10 years ago, I didn't think I'd be defending it in court a decade later," Minnesota Attorney General Keith Ellison said. "While it's far from perfect, it's insured hundreds of thousands of Minnesotans who were uninsured and provided millions with the peace of mind that their pre-existing conditions, preventive care, and adult children would be covered.

"It's contemptible that politicians who would take all that coverage away from people have had 10 years to come up with their own solution and have just plain refused to do so. And it's offensive that they've let millions worry for years about whether they and their families will lose the coverage they won under the ACA, and if they'll be bankrupted if they do."