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Prepared Testimony in Opposition to HJR 33 to House Finance Committee from Nancy Meade, General Counsel for the Alaska Court System. [Prepared Notes; not a transcript of remarks actually given to committee at March 13, 2014 meeting]

As this committee knows, the Court System works closely with the legislature on many bills, but we rarely take any position on proposed legislation. We only oppose a bill (or resolution) when it has the potential to affect the administration of justice, and would therefore impact a core aspect of the judicial branch. I am now opposing HJR 33 because, unfortunately, it is one of those bills. The court does not take this step lightly – taking a position in opposition to a bill or resolution is only done at the express direction of the Supreme Court.

BACKGROUND – ROLE OF COURT

First, I'd like to be clear about the Court's role and why I am testifying. The Judicial Branch of government actually is made up of three entities: (1) the Court System, which is, of course, the principal entity, and two very small ones, (2) the Judicial Council and (3) the Commission on Judicial Conduct. "The Court System" is often used interchangeably with "the Judicial Branch," and this is understandable and nearly always perfectly clear in context – after all, the other two entities are small, with defined authority, few employees, and small budgets. The Court System is NOT the Council – the Council has separate offices, separate employees, and separate duties. I've never been in the Judicial Council offices in the ten years I've worked for the court.

Nonetheless, the Court System's functions and mission depend very much on the work that the Council is tasked with performing: the Council screens judicial applicants to ensure they're qualified, and we need highly qualified judges to maintain the public's trust and confidence in our work. We, the Court System, want and need the Council to do a thorough, fair job with screening applicants for judgeships, so that we continue to have a top-notch group of sitting judges. No one wants judges that are not fairly chosen or that are anything short of the best, most ethical, respectable

professionals in the legal field. It is because the Court depends on the Council's work that I am testifying against this resolution.

CONSTITUTIONAL BALANCE

HJR 33 has the potential to significantly change the judicial screening and selection process – even though that process has worked effectively for over 50 years. The current Council selects the *most qualified* applicants based on their *merit,* a merit selection process that is considered the Gold Standard in judicial selection, if what you want is a fair, impartial judge deciding your disputes. Merit selection means judges are screened based on their legal knowledge, skills (like writing and organizing), their ability to create cogent arguments, the ability to identify flaws and nuances in other people's arguments, their judicial temperament (ability to control the courtroom while being polite and firm in challenging situations, many of which are highly emotional for the parties), and experience (such as their past public and private sector jobs). As a result of the Council's focus on merit, the applicants most qualified to be *A JUDGE* are forwarded to the Governor for selection. We, the court system, and all Alaskans, benefit from having a bench made up of those people. As you've heard others testify, we have not experienced problems with judges that are involved in scandals in case decisions, or corruption, or kickbacks, for example. The Council's current makeup works.

But this resolution would unsettle the carefully considered balance between the non-attorney members, who bring the general public's perspective on what to look for in a judicial candidate, and the attorney members, who bring in a lawyer's perspective on what to look for in a judicial candidate. It is this even balance, this *equilibrium*, that makes the Council's system work so well. *Both* groups are crucial for merit-based decisions that the public can trust: the lawyers have direct experience with the applicant as another lawyer – how is the applicant's legal knowledge? Their writing skills? Their integrity during litigation? Do they comport themselves honorably and respectfully? How do they handle difficult or emotional cases? Do they have the respect of their peers? And the public members bring an equally valid perspective – what is the applicant's ability

to connect with people, to relate to non-attorneys in a meaningful way, and to keep the public's respect, as people and as decision-makers.

The current even balance that is set in the Constitution, with 3 attorney members and 3 non-attorney members (and four needed for any action), keeps the discussion and decisions focused on the merits and qualifications of the judicial applicants. Why? Because neither group can ignore the others' views, or prevail on any decision, without buy-in from at least one of the others. *That is KEY*! They have to, and nearly always in fact do, work together, through consensus.

COUNCIL VOTING DATA

I want to just briefly touch on the votes tallies that show, fairly unequivocally, that the Council operates well, and is not a group marked by factions or divisiveness or problems with attorney/non-attorney splits. In your packet is a summary fact sheet that I prepared for your consideration. The first page illustrates the vote tallies over the last 29 years (as far back as the Council has data), and page two pulls out the more recent years for a closer look. As you can see from page one, in over 60% of the 1,136 votes on applicants taken since 1984, the vote was unanimous, and in *over 80% of the cases, the council's vote was either unanimous or off by just 1.* Those are the statistics for the last 30 years! This is an impressive record of an organization that is cohesive and healthy –not one marked by divisiveness or a failure to function. Any group of 6 voting members that can reach unanimity, or near unanimity, over 80% of the time is not a dysfunctional group.

There was testimony last week about the times that the chief justice votes. That happens only when his or her vote is needed to decide whether a name gets forwarded to the governor – that is, when there's a 3-3 tie, or if there aren't 4 votes because someone abstained or was absent. Overall, since 1984, 94% of all applicants were agreed upon without a vote by the chief justice. Of the *6% in which the Chief did have to vote (which was 68 of the 1,136 votes over the last 30 years*), three-fourths of the time

(51 of the 68), the Chief's vote was to forward the applicant's name to the governor.

Those 68 times the Chief had to vote were mostly because of ties among the members, but that is NOT the number of times the attorneys and non-attorneys tied at 3-3. That's a much lower number – *only 15.* So most of the split votes, 53 of them, have a mix of attorney/non-attorneys on both sides.

Now it is true, that of the 15 votes that were tied at 3 attorneys and 3 non-attorneys on opposite sides (remember, 15 out of 1,136!), the Chief voted with the attorneys more often than with the non-attorneys [10/15] - - but again, the numbers are so small (less than a percent of the over one thousand votes) that it isn't really justifiable to draw definitive conclusions from them. And, in those 15 cases, the Chief's vote ended up sending the applicant's name to the Governor 7 times. The fact is, an implication that the two groups of members are factions or cliques, or even natural divisions with the Chief always on the attorneys' side, just isn't supported by the voting statistics.

And let me mention just one more quick set of numbers. Since 2000, the system has actually worked even a *little bit better* than that. While overall, since 1984 the council has agreed without a tie 94% of the time, since 2000, so just taking the last 13 years rather than a 30-year look, the percentage has *increased* slightly to 96% of the time. Also since 2000, the percentage of the time that the chief justice votes to send the name to the governor has increased slightly from 75% to 77% of the time.

I don't mention this because the changes are monumental, but they are clearly at odds with the view that there is a growing problem. In fact, the change in percentages supports the opposite, and shows the system is more cooperative than ever.

I heard in the supporters' testimony no discussion of these numbers, this evidence, but there has been a suggestion that there is a growing tension between attorneys and non-attorneys, or that things are becoming somehow more lop-sided or skewed in recent years. To help you analyze

that, I have on the second page a breakdown of the most recent four years' worth of votes. You can see that it's still 75% unanimous or unanimous except for 1. You also see a split between attorneys and non-attorneys in 7 votes. Seven out of 201 for that time period, or 3.5%, is hardly evidence of factions or dysfunction. And this does show the statistics that others have mentioned, that the Chief Justice voted more often with the attorneys – in particular, in the most recent 5 split votes, the Chief voted with the attorneys with the result that the applicants' names did not go to the Governor.

But that is not a trend, or a drift, that requires a constitutional amendment. That may be a bump, but the raw number is so small, that one very reasonable *and probable* conclusion is that those 5 individuals were not qualified to sit on the courts that they applied to! Three of those were for seats on the Supreme Court, and two were actually the same individual who applied for two separate openings. This is simply not enough proof to establish that the constitutional balance that's worked fairly and efficiently for 50 years ought to be disrupted.

You can find a lot of information in the data, but the one thing you can't find is evidence of a problem.

PUBLIC INVOLVEMENT

But the supporters' justifications for this resolution have evolved from a focus on the votes and statements about the Council suffering from splits, to a focus on public involvement, and the Council being too small. Again, though, the Council is working as intended, and produces highly-qualified lawyers for the Governor to choose from in his appointments. If you nonetheless reach a policy determination that the Council ought to be bigger, to allow non-attorney participation, you could do that *without upsetting the balance that keeps the focus on merits* of applicants. You could make the Council four Governor appointees, and four attorneys, for example. Or even five of each. And if the true concern is diversity, you could amend a statute and insert some *geographical diversity requirement* – that wouldn't be difficult to draft.

But this version, with the governor's appointees having a majority, has the potential to, as former Chief Justice Carpeneti and others have testified, insert politics at a level of the judicial application process that has been, laudably, focused on credentials.

Again, if the balance were upset, as HJR 33 would do by having an unequal number of attorney and non-attorney members, and if the public members were to have a majority, the need for consensus would be diminished. Then if the majority is of a like mind, or unified in their thinking or approach, they need not consider the views of the other members at all. And the attorney members, who are in a very good position to know the professional competence of the applicants and the skills and abilities that make a good judge, could be excluded.

RETENTION AND POTENTIAL FOR CONTROL

Finally, we've focused on screening judicial applicants, but the Council also has a role in the retention of judges. They review, in great detail, a judge's work, they conduct surveys of jurors, law enforcement, court staff, and others, they collect public input, etc., and then the Council makes a recommendation, Yes or No, on a judge who is standing for retention. It's likely that a great many voters rely upon the recommendations, which are included in the official election pamphlet. Well, consider what happens if a judge issues an order in a case that is contrary to the Governor's wishes. This could be in an environmental case, or an oil tax case, or a subsistence or land use case . . . and the Governor appointees are in a position to determine what the Council's recommendation will be, a very important factor in whether that judge keeps his or her job. It's not difficult to see that there is a threat, a real potential, that the *impartiality of the judge would be questioned* – if the judge rules against the government in favor of a citizen, or an oil company, or a group seeking land use rights, that judge faces the real threat of getting a no recommendation, and losing his position. Would any of us trust that our case was being decided by an impartial judge in those circumstances? That's the situation this resolution creates, though, with a majority of Council members being Governor appointees.

BACKGROUND OF JUDGES

I'd like to address one more issue directly. Some testifiers and members of other committees have acknowledged that they believe the current system doesn't work, because certain attorneys are unable to have their names sent to the Governor, and it's been said in particular that "conservatives" cannot be judges. I want to be clear: the Court System has 73 sitting judges that have come through the Judicial Council process, and they have come from *all sorts of backgrounds*!

There are dozens of sitting judges who had been district attorneys, many were public defenders, and they were attorneys who defended oil companies, insurance companies, the state, and children and parents on every side of family law cases. I cannot say who among our judges are "conservative" or "liberal," (because I truly do not know), but I can say that they are from all sorts of backgrounds. They're from public universities, military schools, private law schools, and Christian law schools. Their interests range from flying and fishing and snow machining, to gardening and athletics and Boy Scouts and church activities. A statement that a "conservative" attorney cannot become a judge, *because* that person is a conservative, is simply not supportable, and is contradicted by the facts about who IS a judge.

[More information on judges is available on the Court's web page, under the link: Alaska Judges.]

SUMMARY

The data, then, just doesn't support a conclusion that there is a problem with the decision-making of the Council. The increased public input and diversity that some supporters are seeking can be accommodated by many options for revisions to laws or policies, without upsetting the balance and inserting political considerations into a process that is currently focused on worthy credentials. The Resolution has the strong potential of causing the public to lose confidence in the impartiality of their court system. I suggest there may be other ways to address the *perception* that some people have that a problem exists -- the Council may

need to do more education and outreach for example -- short of this potentially very problematic constitutional amendment.

It is for these reasons that the Court System views HJR33 as having an impact on the administration of justice – a potentially very negative impact – and that the Court opposes the Resolution.

Thank you for hearing my testimony, and I'd be happy to answer any questions.