Daniel George

From: Bud Carpeneti <budcarpeneti@gmail.com>
Sent: Tuesday, March 24, 2015 2:36 AM
To: Senate State Affairs
Subject: Attn: Chairman Bill Stoltze
Attachments: image.png; ATT00001.txt; image.jpeg; ATT00002.txt; image.jpeg; ATT00003.txt; image.jpeg; ATT00004.txt; image.jpeg

Hon. Bill Stoltze
Chair, Senate State Affairs Committee

Dear Chairman Stoltze:

I would like to testify against SJR 3, due to be heard by your committee on March 24, but am unable to do so because I am out of the state. I would appreciate it very much if your staff might make this letter and its attachment a part of the committee's record of its hearing.

My position on this legislation is informed by my service for over 30 years as an Alaskan judge, 17 on the trial court as a superior court judge and over 14 as a supreme court justice (including the last three as chief justice). I also served twice on the Alaska Judicial Council, the first as a lawyer representative in the early 1980s and the second as chair ex officio when I was chief justice from 2009 to 2012. By way of perspective, when I retired I had served as a judge for slightly over 60% of the total time that Alaska had been a state.

I oppose SJR 3, as is more fully set out in the attached letter that I wrote to Sen. Coghill and the members of the Senate Judiciary Committee last year in regard to the similar SJR 21, and the attached "My Turn" piece that I wrote for the Juneau Empire in regard to the same legislation, for several reasons: (1) Alaska currently enjoys the best judicial selection/retention system in the country, which has worked extremely well for over 60 years; (2) no problem justifying a change in our Constitution has been demonstrated that would justify changing a system that is the envy of other states and towards which other states are moving; (3) SJR 3 would greatly complicate the meeting proccesses of the Council, risk the cohesive functioning of the Council, increase costs to the state, and risk the quality of the Council's work. My support for all of these propositions is set out at some length in the two attachments. (And I would emphasize that, while the attachments are from last year, the statistics concerning council votes, etc., have remained consistent over the past year.)

Finally, because the attachments do not address the question of legislative confirmatiion of attorney members of the Council, I would add this note: It is a bad idea, because it directly contravenes the constitutional bedrock principles of separation of powers between co-equal branches of government and the independence of the judiciary. The framers considered and rejected the notion of legislative confirmation of Alaska Bar Association appointees to the Council, correctly recognizing that it would introduce political considerations improperly at the merit stage of the process. As I am away from Juneau (and my files on this issue), I cannot lay my hands on the statement from George McLaughlin, the chair of the Committee on the Judiciary of the Alaska Constitutional Convention, but he said during the proceedings that legislative confirmation was a bad idea precisely because it would re-introduce the notion of "political correctness" at the stage designed to look only to merit.

Thank you for considering this letter and its attachments, and for all of your past courtesies.

Sincerely,

Walter (Bud) Carpeneti

634 Seward St.
Juneau, AK 99801
February 14, 2014

Honorable John Coghill and Members of the Senate Judiciary Committee
State Capitol
Juneau, Alaska

Re: SJR 21

Dear Chairman Coghill and Committee Members:

I am writing in opposition to SJR 21. I am sorry not to be able to present my views in person, but I will be traveling away from Juneau during today's hearing and will not return until after Monday's hearing. I will attempt to attend any future hearings so as to be able to respond to any questions that legislators may have about the views I express in this letter.

I oppose SJR 21 both because no need to amend Alaska's Constitution to change the makeup of the Judicial Council has been shown and because the proposed change has numerous problems. Below I set out the reasons for these conclusions.

No need demonstrated to change the Constitution. Alaska's Constitution is widely acknowledged as one of the best state constitutions in America. Before beginning the process of amending it, there should be a clearly demonstrated need to do so. But no reason appears to undertake SJR 21's changes. I could not find a sponsor statement in the legislative materials, but presumably the sponsors feel that in some respect the Judicial Council has not functioned efficiently or effectively. But there is no evidence of such failures. In its work nominating candidates to the governor for judicial appointment, and reviewing judicial performance and making recommendations to the voters for or against retention of judges, the Council has — along with the governor and the voters — helped produced a judiciary that throughout Alaska's statehood has been free of corruption, scandal, judicial intemperance, and the other ills that have been produced by selection systems not based on merit.

I believe that the Framers' vision in constructing our merit selection process was extraordinary in balancing the competing demands. In the first phase, the process looks only to merit and competence: The Alaska Judicial Council seeks to find the best candidates based on character, intellectual capacity, faithfulness to the

rule of law, fairness, temperament, integrity, and the like. Applicants passing the first screen are then sent to the governor for his or her selection. This second phase recognizes that elections have consequences, and that the people's will as expressed in the gubernatorial election is properly reflected in the general makeup of the bench. Finally, the voters have the responsibility at regularly-scheduled elections to pass on the performance of judges.

At the critical first phase, the Framers weighed the value of having those most intimately knowledgeable about the attributes of the candidates — that is, the lawyers who daily work with them, see them perform, litigate with and against them — balanced equally with members of the general public. The Framers correctly understood that no one would know better the true strengths and weaknesses of judicial candidates and no one would have a greater interest in insuring that only the very best candidates — the "tallest timber" in the words of one delegate — would make it through to the governor for final consideration. The sponsors of SJR 21 have not demonstrated why this delicate and successful balance should be upset at this time. I believe that it should not be.

It may be that they believe that lawyers have dominated the process and that the general public's representatives must be increased. There is no evidence for such a belief, and it is not true. I have served twice on the Council, in the early 1980's as one of the lawyer representatives and from 2009 to 2012 as chair ex officio. Both times the public's representatives — people like Jack Longworth from Petersburg, Bob Moss from Homer, Ken Brady from Anchorage, Tena Williams from Ketchikan, Ken Kreitzer from Juneau, and others — were strong and articulate voices for the positions that they held. And beyond this anecdotal evidence, a review of the voting patterns from the perspective of lawyers' votes and public members' votes shows that the instances in which the two "sides" split evenly (that is, public members vote identically and in opposition to the lawyers) almost never occurs: it has happened only 15 times in 1,136 votes in the 30 years from 1984 to 2013, the period for which the data is available. With the public members and lawyers evenly opposing each other on one percent of the total votes in 30 years, there is no statistical basis to presume that the lawyers somehow dominate the process.

I hope that the Committee demands a strong showing that there is a problem with the balance struck by the Framers before it considers approving this legislation. Our Alaska Constitution has served us well in judicial selection since statehood, and the possibility of changing it should not be entertained lightly.

SJR 21 creates numerous problems. I set out below some of the problems that

SJR 21 would create. This list is not exhaustive, because I have been aware of the proposed legislation for only a few days.

1. SJR 21 would complicate the meeting process. The six regular members of the Judicial Council are all volunteers. They are entirely unpaid (not even receiving honoraria, even though the members of many other state boards and commissions receive such honoraria). They meet frequently (the Council averaged about 15 meeting days per year during the 2009-12 period with which I am most familiar). Co-ordinating the schedules of six busy persons was difficult. Adding 10 members would introduce an unwelcome level of complexity to the process.

2. SJR 21 would risk the cohesive functioning of the Council. It is not difficult to imagine that the Council would be forced to meet in panels not comprising all of the members. It would then lose the cohesion that has characterized its work since statehood, in which all of the members participate in all of the decisions, producing an even and tempered quality to the Council's work.

3. SJR would increase the costs to the state. While it is true that Council members receive no financial compensation for their work, travel and related costs would increase substantially.

4. SJR 21 would risk the quality of the work done by the Council. The burden on Council members is terrific: They must review hundreds and, at times thousands, of pages of material for each new judgeship and for the retention evaluations. (Before switching to digital information delivery, it was not uncommon for the "binders" for a given session to total a foot or more in height when placed on a desk.) Finding the persons willing to make this great of a commitment over a sustained period of years will not be easy. The experience of the Alaska Judicial Council has been of a committed group of persons willing to do the hard work necessary. Tripling the size of the Council may result in a lowering of the quality of its work.

I hope that I have conveyed the depth of my concern about SJR 21. I believe firmly that Article IV is a true gem of our Constitution, and that the Alaska Judicial Council has functioned efficiently and effectively in helping to provide Alaskans with

a judiciary of which they are justifiably proud: dedicated men and women who follow the law without fear or favor, who strive to be fair and impartial, and who leave behind their political beliefs when deciding cases. I worry about tinkering with that system when no reason to do so has been shown and when obvious problems attend the attempt to tinker.

Thank you for considering my views. I am sorry not to be able to appear personally before your Committee, and I would welcome the opportunity to answer your questions in the future should it present itself.

Sincerely,

Walter L. Carpeneti

Walter L. Carpeneti

2014

My Turn: Judicial selection process doesn't need fixing

Posted: April [illegible] 2014 [illegible]

BY WALTER L. (BUD) CARPENETI

FOR THE JUNEAU EMPIRE

Pending before the Legislature are companion proposals, SJR21 and HJR33, to amend our constitution to increase the size of the Judicial Council, the body that nominates people to the governor for appointment as judges.

The governor now names three of the six regularly-voting members, but these proposals would let the governor name an outright majority. It is a bad idea that the Legislature should reject. Here's why:

First, our constitution, which is widely recognized as one of the best in America, is working well regarding judicial selection. We have a merit selection system, in which a non partisan council (the Judicial Council) nominates candidates based on merit. The governor then appoints from the group nominated. Throughout Alaska's history our judiciary has been free of corruption, scandal, judicial intemperance and other ills that have been produced by systems in which political considerations play a greater role. Our system is not broken; it does not need fixing.

Second, our constitution carefully balances merit in the first phase. The Judicial Council looks for the best candidates based on character, intellectual capacity, fairness, faithfulness to the rule of law, temperament, integrity and the like, when the governor chooses from among the candidates nominated. Giving the governor the power to name the majority of the Council would risk making purely political considerations – for example, loyalty to a particular governor and his or her political goals – the most important factor in judicial selection. This is a sure road to destruction of judicial independence.

Third, backers of the constitutional amendment claim that lawyers "dominate" the council because half of the regularly-voting members are lawyers, and a fourth, the chief justice, votes to break tie votes (four votes are needed to nominate a candidate). But the evidence rejects such a claim.

Records of Judicial Council voting go back to 1984, and they show that in 1,136 votes over that 30-year span, the council split evenly between the lawyers and the non-lawyers on only 15 votes -- about 1 percent of the time. This hardly suggests lawyer domination. Moreover, the constitutional framers included lawyers on the Council because the framers correctly understood that no one would know better the true strengths and weaknesses of judicial candidates and no one would have a greater interest in ensuring that only the best candidates would make it through to the governor for final consideration. Backers also claim there should be more rural representatives to the council, but their proposals require absolutely nothing in this regard. Moreover, the governor already has the power to appoint rural representatives, and the constitution requires geographic representation to be taken into account in appointments. "Rural representation" is a sham argument.

Finally, the proposals to increase the size of the council creates numerous problems. They would complicate greatly the meeting process of an all-volunteer, unpaid group that devotes several weeks (in meeting and travel time) each year. They risk the cohesive function of the council because increasing the size leads to the increased possibility of the council working in panels or without a full complement of members at each meeting. They would risk the quality of the work done by the council – members review hundreds, and at time thousands, of pages for each judgeship evaluation. Finding people willing to make this great a commitment over a period of years will be made only more difficult by increasing the size of the group.

Because our constitution has produced a fair and impartial judiciary, because it protects all Alaskans in ensuring judicial independence, and because the arguments for changing the Constitution lack merit, the Legislature should reject SJR21 and HJR33.

• Walter L. (Bud) Carpeneti served as the Chief Justice of the Alaska Supreme Court from 2009-12.

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