Alaska Constitutional Convention Minutes Concerning Judicial Selection and Retention

Introduction

Alaska's constitution was adopted by the delegates to the Constitutional Convention on February 5, 1956; ratified on April 24, 1956; and became effective when the Alaska Statehood Act was signed on January 3, 1959. Article IV described the judiciary, and the method of selecting judges using a merit system where the governor appointed candidates nominated by the a citizens' commission, the Judicial Council. Delegates first debated the pros and cons of using a merit selection system rather than an elective or completely appointive system, and settled on merit selection after the extensive discussion excerpted below. Delegates also considered the requirements for retention elections. The minutes excerpted here show the wide-ranging and thorough nature of the discussion they engaged in before settling on the final structure embodied in the constitution.

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PRESIDENT EGAN: He moves the amendment to strike Section 4. Is there a second to the motion?

SUNDBORG: Mr. President, I will second for the purpose of allowing Mr. McNealy to explain what his intention and purpose is.

PRESIDENT EGAN: Mr. Sundborg seconds the motion to strike Section 4.

MCNEALY: Mr. President, I am not going to take a great deal of time today as I understand the bill possibly will be continued in second reading until after the recess and very likely it will not be necessary for me to speak upon all these amendments because probably my thought is included in my motion to strike Section 4. It states that, "Justices of the Supreme Court and judges of the Superior Court are appointed by the Governor on nomination by the Judicial Council as provided in this article." Being an attorney, I know the background of the appointment system of judges. Being an Alaskan, I have lived under the appointment system so long that I feel that I should have the right to vote for these judges. The thought behind this, I believe, and the thought of the Judiciary Committee no doubt is to keep judges out of politics. In my opinion, this appointment method will bring judges into politics more so than an election by the people. For that reason and in regard to many other reasons, which I do not want to take up the time of the Convention to discuss now, I am opposed to the appointment by the governor on nomination by the judicial council.

PRESIDENT EGAN: Mr. McNealy, in order to clarify a statement that you just made, the Chair feels obligated to state to the delegates that anyone who is under the impression that any official action has been taken that will hold any proposal in second reading is wrong. There has never been any action that will hold anything in second reading officially as you mentioned, Mr. McNealy. If it was your feeling it might be held until after the hearings recessed, no such action has ever been taken and the Chair wants to clarify that point to all the delegates. Mr. McLaughlin?

MCLAUGHLIN: Mr. Chairman, as Chairman of the Judiciary Committee, I feel in answer to the argument presented here and the proposal to strike, I feel it proper to point out to the Convention that I, probably in the Convention, was the only elected judge present in the Convention. I was twice elected as municipal Magistrate for the City of Anchorage. I might point out, not in vanity or pride but as a factual argument, that I never lost and never won by less than double the vote of any other candidate. The last time I ran, my recollection is that I won four to one. If any man should be in favor of the elective system, it should be I. I might point out that in terms of the elective system, no member of the

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Judiciary Committee and that consisted of two laymen, one of whom had spent 15 years in law enforcement activities, never questioned the impropriety of having elective judges in Alaska. Historically, at the time of the adoption of the Federal Constitution, I don't believe that any state of the Union authorized the election of its judges. They were all appointed. When the elective system came in it was approximately the middle of the Nineteenth Century. It was found inadequate because of the fact that we will be confronted here in Alaska with not a nonpartisan judiciary, but a judiciary that in substance would be dictated and controlled by a political machine. I am a partisan myself, but I don't believe that our judiciary should be subject to the influences where they would have to go to any clubhouse to secure their nomination or have to secure funds and sometimes excessive and exorbitant funds for the purposes of being elected. I might also point out that one of the dangers of the elective system is the fact that a judge, whenever he makes a decision, he has to keep peering over his shoulder to find out whether it is popular or unpopular. If we determine the validity of our laws in terms of popularity as the general acceptance, we are then not a government of laws on which we pride ourselves. It is not the function of the judge to make the law, it is his function to determine it; and the way to keep them independent is to keep them out of politics. Historically, in

terms of this document here, there is nothing in it that is radical. There is nothing in it that is theory. All of it has worked. California, in 1932, adopted what is known as the Missouri Plan. That is a system of selection. One reason why we did not permit the governor of the state to pick candidates and have them approved or ratified by the senate or house of representatives was that it was discovered under the California Plan that there was a tendency on the part of the governor to always pick men of his own political party, subject to the confirmation, not of the senate, but a group called a "committee on qualifications." He would just present them with a long line of Democrats or a long line of Republicans. Does the system work? The system does work. The method by which we determine how the judicial council would be created was--we followed the Missouri Bar plan that has been in effect (when I say Missouri Bar plan, I mean the Missouri Plan which is part of Article 5, Section 29, of the Missouri Constitution) since 1942 and my recollection is that it has been ratified by the voters three times in succession. The complement of our judicial council, that is three selected directly by the bar association, three appointed by the governor, and the chief justice being ex officio member. The constitution of our judicial council is exactly the same as that in the State of Missouri. We did not follow the New Jersey Plan although the New Jersey Plan, which has been sponsored by Chief Justice Vanderbilt, who is Chief Justice of the Supreme Court of New Jersey--Judge Vanderbilt is not opposed to the Missouri Bar Plan--but frankly because of the complexities of the New Jersey judiciary, they

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could not get it through. In New Jersey, the governor appoints and his appointment is ratified by the senate. In every modern constitution, and when I say modern constitution, with the exception of Hawaii which evaded the issue, in every modern constitution--by that I mean all our latest--Missouri, the state of New Jersey, and Hawaii--they all provide for appointive judges and not elective judges. Have we compromised? Yes, we have--we have compromised--we have accepted the Missouri Plan. That means in substance what happens is that three lawyers appointed by the bar association, as under the Missouri Plan, and the three laymen as appointed by the governor and approved by the senate initially determine who the candidates will be. What is the theory? The theory is you have a select group. The lawyers know who are good and they know who are bad. The laymen represent in substance the public in order to protect them in substance from the lawyers, but they are confirmed by the senate for one reason. The laymen in the committee insisted upon it so that we would have a broader base and the governor himself would not necessarily be able to nominate to the judicial council, his own house. The governor is presented with two names, two or more names. Missouri says three or more. We figured because of the size of the Territory, initially it would be preferable to be sent two names. The governor has no other choice, of the two names presented, he takes one, fills the vacancy in the court. In terms of the general acceptance of this plan--is it radical? Is it new? Is it theory? No sir. It has been approved by the American Judicature Society. It has been approved by an organization I know, which is, forgive me, I know I might affront many members here, which is renowned for its conservatism--the American Bar Association. It has been in substance approved by the Alaska Bar Association, and it has been approved by probably the organization in the field which is most zealous in its idealism, the American Judicature Society. There is nothing unusual, nothing new. What we are trying to prevent are some of the travesties which have existed in some of the states where our judges are picked and plucked directly from the ward political office. Many of the members compromised. We are not happy, in a sense, with the compromise, but the only system that has ever worked apparently in recent years, has been a combination of the appointive and the elective. I might carry on a bit and point out what happens in terms after the governor does appoint from the list presented to him as under the Missouri Plan. Roughly, three and one-half or four years later, the judge is required, every judge without exception, is required to go on the ballot for approval by the voters. Does he have to spend any money? No sir. What is the requirement? The only requirement on a non-partisan ballot could be, "Shall Judge blank' be retained in office?" the Missouri Plan provides and the New Jersey Plan in substance provides (my figures are rough), that roughly a year and one-half after appointment the judge will be put on the ballot to determine whether or not the public desires to retain

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him. It was the view of the Committee that in order to attract good men to become candidates, the only way we could assure the attraction of good candidates was to assure them they would be in office at least for a period of three and one-half years. Why is that necessary? Because after a year and one-half, a judge might make a very unpopular decision and he would not be able to overcome that in terms of popular resentment and he might be forced out of office after a year and one-half. It is not universally true, but generally your best practitioners in the law are also the men who have the best income and the best practice. A man with good income and good practice will not be attracted to the bench if he feels that after a year and one-half, he will hazard his whole career. He has already hazarded his private practice. He will hazard his whole career with the possibility of being rejected. Three and one-half years is a good inducement. If he is re-elected after three and one-half years, then under our terms, the terms of our proposal here, he will then sit on the bench for a period of ten years if he is a supreme court judge or he will sit on the bench for a period of six years if a superior court judge and then he will automatically go on another nonpartisan ballot to determine whether he shall be retained or not. That compromises the difficulty in the American judiciary system, and when I say compromise, it is the best compromise and the best solution to a vexing problem between those who feel we should have lifetime tenure so the judges can be absolutely independent or whether we should have short terms so the judges could be subject to popular will. The popular will should be expressed even in the control of the judiciary, but the way to control it is to put the judge on a nonpartisan ballot. It does not cost him a nickel. He is running against himself, he's not running against anybody else. In terms of whether or not the lawyers would pick the poorest or the best, my answer to that is the answer of Benjamin Franklin, who in arguing for appointive system pointed out that it would be very advisable to have an appointive system under the Federal Constitution because of the fact that every lawyer, having determined that a judgeship was open, would promptly designate and recommend the most successful of his brothers in order to steal his practice. Do the lawyers, do they have a vested interest in the proposition? Definitely they do, but as craftsmen or professional men they know best who is the most desirable. Will you get unanimity on that judicial council? If the Alaska Bar Association or if any bar association in this Territory or in the United States can be used as an example, as long as you have three lawyers you will have three different opinions. It is probably the most democratic and probably the only efficient system that has yet been devised. It is not a crackpot idea, it has worked and regularly. State constitutional conventions have tried it. In general I might point out this--this applies generally to all the recommendations of the American Judicature Society, all the recommendations of the American Bar Association. It conforms

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to the theory under which the Missouri Plan was adopted, and if this is adopted, this will be (Hawaii avoided it) the most modern, most liberal, most workable judiciary article of all the constitutions of all the forty-nine states. Is it theory? Is it social planning? It is based on practice. It is based on experience and it conforms to very good theory.
PRESIDENT EGAN: Mr. Londborg.
LONDBORG: Mr. President, may I direct a question in order to get information? According to your proposal, the judiciary council submits nominations, not less than two. What happens if the governor refuses to appoint either of the two or three as the case may be, if they do not meet with his approval?
MCLAUGHLIN: Others can be presented.
LONDBORG: Would he have the right to call for other nominations or must he stick with those originally presented?
MCLAUGHLIN: In theory, the governor would be required to stick with those nominated.
LONDBORG: May I ask this, just for lack of information on my own part on the Bar Association--who and how do people get into that? I take it they have to be lawyers.
MCLAUGHLIN: They would have to be lawyers, Mr. Londborg. There was no attempt made--if we had started to define everyone's qualifications--much of this will be left to the legislature, but normally that means lawyers.
LONDBORG: Then I'd like to ask this question, is it true that the judiciary council is composed of a majority of lawyers?
MCLAUGHLIN: That is true.
LONDBORG: That is counting the supreme court judge?
MCLAUGHLIN: That is true. I might point out that in Missouri, the appellate Judicial Commission (this is the Missouri Plan) consists of seven members: the chief justice; three elected lawyers; and three laymen appointed by the governor; and these are the ones that designate for the governor. They have subordinate commissions, the circuit Judicial Commission consists of two lawyers, two laymen and the president and judge of the court of appeals.
PRESIDENT EGAN: Mr. Victor Rivers.
MR. RIVERS: I have a question, Mr. President, that I would like to present to any member of the Judiciary Committee. That is this, that I want to state first that I am very favorably
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impressed with this particular section. The appointive power however clearing through the governor--in most of the state impeachment clauses--the two or three highest elective officials or any elective officials being impeached in ordinary procedure, the impeachment springs from the house and is tried by the senate with the chief justice sitting or some of the other supreme court justices sitting as the presiding officer of that body. Now we have a situation here, I am just wondering why the appointive power of the governor is invoked in this particular clause, because it would seem to me with the judicial council and the recommendations such as they have made, it might be best to submit the recommendation directly to the senate. The governor, if he were in a position where he is being impeached, would then have on the presiding bench, on the body that was impeaching him, a justice whom he had named for appointment and I wonder what the thinking of the Judicial Committee on that is.
MCLAUGHLIN: It is my understanding that Mr. Rivers has some potential objection to the appointment of the nominees to the bench by the governor. Is that right, Mr. Rivers?
V. RIVERS: No, it is more a question to get explanation on the floor as to what would happen in a case like this. I have a good deal of regard for the section you folks have drawn up. I regard it very highly as a layman, but I did want to find out what your thinking was as to why we had to clear the judges through the governor in any event. Why didn't they spring from this appointive and recommending body directly to the senate for confirmation rather than clearing through the governor in any instance, because there might be a conflict of interests if these supreme court judges were called to sit upon the trial of a man whom they had received their appointment from.
MCLAUGHLIN: The thinking of the Committee, Mr. Rivers, was that we wanted something that had precedent and that worked. It has worked in Missouri, it is working in a limited sense in New Jersey, it is working in California. That is, we wanted a practical precedent for it. We did not want to experiment. We did consider the possibility that the judicial council do it, but we wanted some participation by the executive in it and in fact, one of the laymen insisted on the Committee--insisted that not only the governor appoint the laymen to the Committee, but they be ratified by the senate so we would have a full participation in the process. As you know, under the model state constitution, the chief justice runs for election and he designates the judges. It was the feeling of the Committee that that would be too much of a closed corporation, that is the chief justice appoints, in lieu of the governor, under the Missouri Plan, but since it had been untried, the Committee didn't want to consider it. The fact of the matter is, there are many problems that we cannot anticipate, all
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the problems that will arise, but we took the best available everywhere and we applied it and when the problems arise, then we will attempt to solve them.
PRESIDENT EGAN: Mr. Smith.
SMITH: I believe the mover of this amendment intimated that the Committee had based their favoring the appointive system on the basis that it would take the judgeships out of politics. I don't know what the Committee's thinking has been, but I certainly would not defend either the appointive nor the elective on the grounds that it would take the judgeships out of politics. I believe the political implications would be equal in either case. However, the appointive system does have the advantage of being selective as to the qualifications of judges. Quite often under an elective system a man is elected on his personal charm or his popularity and quite often his qualifications are not closely examined. Therefore, I would oppose the amendment.
PRESIDENT EGAN: Mr. Taylor.
TAYLOR: Mr. President, in regard to a question submitted by Mr. Rivers. Now I believe Mr. McLaughlin touched upon that, but I believe Mr. Rivers loses sight of the fact that the governor does not select any appointee--that the only ones he can appoint to either the supreme court or the superior court are those men who have been selected by the judicial council, so the governor does not have any choice in the selection of the candidate for office. He merely appoints. I don't believe that would create such a feeling of gratitude towards the governor from a man that was appointed to the supreme court or to the superior court that it would cause him to be derelict in his duties. Also, I would like to point out that over many years there has been a great controversy in the legal profession throughout the United States. The American Bar Association Journal, which I have

been receiving for some twenty-seven years, periodically comes out with articles by various practicing attorneys and by judges, leading men in the profession, who have felt that a distinct change should be made in the selection of the judiciary. When the Missouri Plan was adopted, I believe it was in 1945, it was felt that there was a distinct improvement in the methods of choosing judges, that it abolished the necessity which had prevailed for many years of having to get out into the rough and tumble of a political fight, to spend money, perhaps depend upon certain groups for the support to get elected to a judgeship. Now in this particular instance we have got away from that necessity. We have the laymen and the attorneys--and coming back to this attorney--I might mention to the Convention that the attorneys now are organized in a body known as the Alaska Bar Association. It is an integrated bar, an official body of the Territory. Any person seeking to practice law in the Territory
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of Alaska, before he can practice, must be a member of the Alaska Bar Association, and he is bound by the actions of the integrated bar, so it is through the integrated bar that these names are selected. It is a democratic election among the attorneys for the selection of these judges. I think Mr. McLaughlin has elaborated upon that as to the selection and the lawyers would know possibly who would be the most able sitting on the benches. The less lucrative practice the man has, the more he would like to see the able man who has been making the money step up there, he might get some of his practice. That is true. It was not original with Mr. McLaughlin. Thomas Jefferson or Benjamin Franklin said that. I feel that in view of the historical matters of selection of judges, which has not met with the approval, that we have before us now an article which we hope will be adopted as it is into the constitution, and I know that if this article is adopted by the Convention and becomes a part of the constitution that every university in the United States that has a law school and all law societies that have the opportunity of reading this article can honestly say that they have perhaps the most progressive and most modern and up-to-date system of selecting the judiciary of any state in the United States, and I would like to see this adopted by this Convention without one syllable or a comma or a period left out, just as it is. Mr. McNealy says, "Well, we have had judges appointed here for many years. I would like to protect those men." Perhaps Mr. McNealy has practiced under those appointed judges so long he is like the prisoner who after many years begins to love his chains.
V. RIVERS: May I ask a question of Mr. Taylor?
PRESIDENT EGAN: You may, Mr. Victor Rivers.
V. RIVERS: Mr. Taylor, if the governor does not appoint and the appointment springs from judicial council, why is not only one name recommended to him instead of two?
TAYLOR: It is to give a choice.
V. RIVERS: He has a choice power and appointive power?
TAYLOR: That is correct. I might say that there will be legislative act to implement these sections that are in here. He will have to appoint because it devolves upon him. There can be three to give him a choice if he wants them, according to what the legislature says.
MCNEALY: Mr. President, this matter I wish to assure the delegates, is not personal with me and if you will bear with me for a couple of minutes I am going to make the whole pitch, so to speak, on this particular amendment. If this amendment fails, then I am going to ask unanimous consent to withdraw all the
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other suggested amendments for the purpose of saving time of this Convention, because if all the amendments were considered and argued upon and I were fortunate enough to have a second, this discussion could go on for days and even weeks. I offer this amendment. I am not sold on the bill as it is. I am not particularly sold on the matter of the election of the judges by the public. I owe it to other attorneys who have asked me to offer this amendment and to laymen who feel that they should have the right to vote for all the offices that they possibly could vote for under a system of state government. I did not start in the law business as of yesterday. I have been admitted to the bar almost twenty-seven years and I did not have the funds to attend a university and the prior four years then I spent in the law office, and that was a continuous four years of work in a law office, so for more than thirty years I have been depending upon the law for my bread and butter, and on the point of having a successful practice, why that certainly should not prevent me from being one of those appointed if I ever desired to be a judge, which I don't think I could afford to because of probable pay scales, so I'll probably be appearing before the judges as long as I'm able to get around, possibly as long as old Judge Grigsby down in Anchorage or our Dean here, Julien Hurley. Now as far as your election of changing judges in office, I want to call attention to another saw which has been in effect since time when the memory of man runneth not to the contrary and that is that judges never die and they very seldom retire. In this matter of running against the record, I want to argue that point just a minute. To say that the voters are going to have an opportunity now, it's going to be put on the ballot--shall Judge So-and-So be reelected. Well, I can think of this situation, I am concerned about this. Judge So-and-So has been appointed, and he serves and he is on the supreme bench for ten years or is on the superior bench and has served for six years and then he runs against his own record. All of the attorneys that are practicing before this judge learned over this period of six or ten years that Judge So-and-So is a stinker. He comes down with some of the lousiest decisions. He steps on this fellow and that fellow, he does not follow the law. He hands down decisions that are unfair to people. Now, all of the lawyers this situation, but the general public does not know. The general public does not pay too much attention to judges and what is going on in court unless it is your case that is before the court, so the time eventually rolls around--the six or ten years--and old Judge "Stinker" comes up to run against his record. So then the lawyers, if they can do it--Mr. Taylor, to digress a minute, mentioned the American Bar Association. Never have been and never will be. If my memory serves me correct, there are probably only about thirty percent of the lawyers in the United States that do belong. I am not going to state why I do not belong and why the other sixty or seventy percent don't--but the fellow comes up. The lawyers
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then look over those now that belong to the American Bar Association at least, and possibly under our Alaska Bar Association, I haven't seen the Canon of Ethics adopted, or to be adopted, but if the members of the American Bar, under the Canon of Ethics can do this, can get out and bring to the public's attention that Judge So-and-So should not be re-elected, (and I question under the Canon of Ethics of the American Bar will allow it) then the lawyers carry on a campaign in the newspapers and over the radio and say that Judge So-and-So is no good and urge the public to vote against him. Now, I am speaking from years of experience as to how the public in general feel about the attorneys and I am in hopes that the Alaska Bar Association will so regulate our own ranks that the attorneys will be considered as professional men and not shysters in the future. But in carrying on this campaign with the general public, unless their minds are changed, they are going to say,

"What is the matter, this bunch of lawyers here are trying to get rid of good old Judge Whoozit." So Judge Whoozit comes out, he doesn't have to spend any money campaigning, all he's got to do is tell the reporter, "This bunch of lawyers--I have stepped on their toes in trying to carry out the laws as written and this bunch of lawyers are trying to sabotage me." Judge Whoozit will go back into office by the biggest vote that it is possible to give him. The only ones who will ever vote against him will be the lawyers and there's not enough of them in the Territory to have an effect on the election. If I were a judge and wanted to be continued in perpetuity in office, then I would want the attorneys to come out and recommend against me. Now, and as I said before, I am going to withdraw these others and this will be my last time on the floor if you will bear with me just a few more moments. Now, I would like to speak personally of the matter of politics involved. I don't think that running for a judgeship either, should be a popularity contest. But here we have three laymen appointed by the governor, three lawyers appointed by the bar association. I am looking ahead to a situation of this kind that will arise where a governor appoints three laymen, now the governor appoints these three laymen and they are beholden to the governor. The governor, be he Republican or Democrat, tells these three laymen, "Here is Jones and Smith here now, they have been good party workers, they helped get me into office. Now, I want you three laymen on the board, Jones and Smith should be rewarded, so I want you to come up with their names." Then the three lawyer members don't agree. They want two different members to be appointed, so they come up with two. The three laymen members say to the governor, "What are we going to do?" the governor says "Hang tough." Now we have a precedent for that. Take your Employment Security Commission here in the Territory, which is one of these two and two deals, two from labor and two from management, and they have not been able to agree on one single solitary important problem under the Employment Security Commission, and it is questionable that they ever will be able to.

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They can't even agree, or haven't the last time I knew, on a bill which was passed in the last legislature hoping to break the deadlock by authorizing the four of them to get together and select a fifth member. So I can see an absolute stalemate in that regard. Going further, now currently the vast majority of states elect their judges. First I want to apologize to the Convention here about saying anything about Nebraska. That is where I studied law and where I was admitted to the bar, and being opposed to their unicameral system, maybe I should be opposed to the fact that they elect their judges. I have been an inactive member of the bar there for a great many years, and the other day I received a list of the judges that were still on the district court bench--we called it district court there, not superior court--were on the district court bench in Omaha. At the time I was there, in the late '20's and early '30's, we had twelve district judges in Omaha--Douglas County, I should say. These twelve district judges ran for election every four years. I noted in the recent paper that I got from the Quarterly Law Review from the Bar Association that all twelve of these district judges are still on the bench in Omaha. They have been running for office every four years. They are good judges. The lawyers like them, the people like them. It is no argument that you are going to have inferior men on the bench simply because, if the judge is not a good judge, the people themselves are going to see that he is removed. Now, in closing, I believe it was on the floor that this constitution should be more or less of a fundamental document. I am in favor of a fundamental document. I believe that this judiciary article, with all due respect to the attorney members and the laymen members on the Judiciary Committee, that it could have been solved by saying, "There shall be a supreme court and such inferior courts as the legislature may establish from time to time," which would have taken care of the matter just as well. I assure you, ladies and gentlemen, I will not speak upon this subject again, and I thank you for this opportunity.

PRESIDENT EGAN: Mr. Ralph Rivers?

R. RIVERS: As a member of the Judiciary Committee, I would like to second the able presentation of our Chairman and to endorse the points brought out by Mr. Taylor. I was a member of the bar in Seattle when I was a young fellow, over twenty years ago, and there they had the election system. The judges had to file in a competitive political field every two years, and there was always that undercurrent that litigants were contributing to the judges' campaign funds. There was nothing improper for a person to contribute to the campaign fund, but there was an undercurrent of chicanery. It does not seem to be right that a man sitting on the bench should be the subject of contributions from various and sundry people, either presently litigants or people with cases pending. The best soap-box orator often times gets elected and your better

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attorneys who have these qualifications we are all aware, that are required, would hesitate to throw their hats in the ring and get into that kind of a circus. I concur with Mr. Smith that this has the virtue of a screening process, an orderly screening process. We label it nonpartisan because the ability and qualifications should have nothing to do with the political party. But actually this is not only an approach at nonpartisanship although politics is bound to enter into it to a certain extent, this is a screening process which is the most important point involved. So I think that it is positive with some decency of approach and thinking the judicial council will seek for the best available timber, and we take a bow to the governor in taking his choice of two persons that are nominated, or three if we have that many to spare and are available to be nominated, but he has no alternative but to pick one of the names that are presented to him by the judicial council. There is the other point that there will only be six until a supreme court justice is appointed and the only chance for a deadlock would be on nominating two or three people for the office of supreme court justice. After that you have your seventh member and there will be no chance of a deadlock. I am willing to trust the integrity and good sense of the six people first appointed to judicial council to be able to agree on two or three nominations for chief justice, and I am willing to trust the governor to take his choice of those two or three names that are presented, so I see no serious problem of a deadlock in order to get the machinery fully implemented. I go along with Mr. Taylor that this Committee has given and taken and bumped its head, I should say the members have bumped their heads together. There has been some compromising and adjusting, but our composite thinking is better than the thinking of any one of the seven of us that constituted that Committee. I believe we have a constructive article, one of which we can be duly proud. So outside of letting the Style and Drafting Committee change a few commas, Mr. Taylor notwithstanding, and polish up a sentence or two, I hope it is adopted the way it is written.

JOHNSON: I move the previous question.

PRESIDENT EGAN: Mr. Johnson moves the previous question.

TAYLOR: I second the motion.

PRESIDENT EGAN: Mr. Taylor seconds the motion. The question is "Shall the--"

SUNDBORG: Parliamentary inquiry, Mr. President. Is the matter of voting on the previous question debatable?

PRESIDENT EGAN: No, it is not, Mr. Sundborg.

SUNDBORG: I call for a roll call.
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PRESIDENT EGAN: The question is, "Shall the previous question be ordered?" A roll call is asked for, the Chief Clerk will call the roll. Mr. Smith?
SMITH: May I rise to a point of information? The previous question would be the vote on the amendment?
PRESIDENT EGAN: The previous question would be the vote on the amendment. What you will be voting on now is whether you should order that previous question. Mr. Davis?
DAVIS: Mr. President, the amendment is only to Section 4, is that right?
PRESIDENT EGAN: That is right. We are not speaking of Section 4 right now, Mr. Davis. We are speaking as to whether we will order the vote on Section 4. The Chief Clerk may call the roll.
(The Chief Clerk called the roll at this time with the following result:
YEAS: 41- Armstrong, Awes, Barr,
Boswell, Coghill, Collins,
Cooper, Cross, Doogan, Gray,
Harris, Hellenthal, Hilscher,
Hinckel, Johnson, King,
Knight, Laws, Lee, McCutcheon,
McLaughlin, McNealy, McNees,
Marston, Metcalf, Nerland,
Nolan, Peratrovich, Poulsen,
Reader, Riley, R. Rivers,
Robertson, Rosswog, Smith,
Stewart, Taylor, VanderLeest,
Walsh, White, Wien.
NAYS: 12- Davis, Emberg, V. Fischer,
Hermann, Hurley, Kilcher,
Londborg, Nordale, V. Rivers,
Sundborg, Sweeney,
Mr. President.
ABSENT: 2- Buckalew, H. Fischer.
LONDBORG: Mr. President, I would like to change my vote to "no."
MR. PRESIDENT: Mr. Londborg wishes to change his vote to "no."
CHIEF CLERK: 41 yeas, 12 nays and 2 absent.
PRESIDENT EGAN: So the previous question has been ordered.
JOHNSON: I request a roll call on the previous question.
V. RIVERS: Is the question of personal privilege in order at this time?
PRESIDENT EGAN: If there is no objection, Mr. Victor Rivers.
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V. RIVERS: I just want to say that we are acting in final action now on the amending of a bill, rather the amendment of a proposal. It seems to me not only good courtesy but good judgment that the previous question and final action should be used very charily. I can see using it late at night after many hours of debate, but it is hard for me to conceive foreclosing any member of this group from having their full expression of their views on the final action of any part of any proposal that comes up. It seems to me that it is very poor policy to exercise the previous question in a matter of prime importance that we are taking the primary action of amending. I have sat in a good many deliberative bodies. I have seen the previous question used to stop debate on minor points where you have something at issue which may have not been primary to the functioning of the body. But I seldom have seen the privilege of the previous question abused to stop debate on a final action of a measure that is coming up for either amendment or final passage. It seems to me that debate on these things of importance that are going to carry on for many years should not be limited to the expression of the opinions of a few. We are here for the primary purpose of considering all facets of all of these questions, and it seems to me that moving the previous question forecloses substantial consideration. I think there are men in this body who should not only express their views but to express their views for the record, should be heard in regard to what they have to say pro and con on this question. It is one of the fundamental questions involved as to whether or not we have the appointive system of judges. I might tell you I favor the appointive system of judges in the manner set up here. However, that is beside the point. It seems to me, in determining intent and determining the consensus of this body, the record should be complete. It seems to me that moving the previous question was entirely one of--not a desire to foreclose the record but to foreclose many men who might have had some valuable comments to put into this record on this point. I just want to say at this point I am going to close my discussion on the previous question, but I just want to say in reading the handbook (the Hawaiian Legislative Handbook) in connection with judges, I want to call your attention to the first paragraph. "Independence of the judiciary is a fundamental principle of our American court system. How to achieve that independence is a problem still unsolved. All agree that the first step is to find the right method of selecting judges which will insure a bench free from the influence and control of party politics, individuals or pressure groups." Now it seems to me this matter should have a more full discussion before action is taken on this particular amendment.
NORDALE: I would like to echo everything that Mr. Rivers says and I believe that every paragraph of this constitution is too important to preclude anyone from expressing his views. I would like to move to rescind the action on the previous question.
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SUNDBORG: I second it.
PRESIDENT EGAN: It has been moved and seconded that the action taken to order the previous question be rescinded. All those in favor of rescinding the action ordering the previous question will signify by saying "aye," all opposed by saying "no." The "ayes" have it and the action has been rescinded. We have before us Mr. McNealy's proposed amendment to Committee Proposal No. 2. Mr. Hurley?

HURLEY: Mr. President, in order that there will not be a feeling on the part of the fifty-five delegates that this is a courtroom and only attorneys are speaking, I would like to endorse in substance Section 4 of the proposal. I think Section 4 goes to the meat of the whole proposal and as such it will be necessary for us probably to digress into a great many other things that may have been taken care of in later sections. Generally speaking, I think that Mr. McNealy is extremely sincere in his objections to it, but I too have lived under an area where judges were elected to office from anywhere to two or four years. I too have found that those judges have stayed in office from anywhere to twenty to forty years. I think that is a very substantial argument why a system that is prescribed here should be adopted. In other words, it is not an argument against it. The main argument against the running of judges on a open ticket in a prescribed time against other competition, I think, has been ably stated by Mr. Ralph Rivers, that it does degenerate, and I have seen it degenerate into a question of whether a judge is capable of making his own decision on the litigants that are before him and whether he has in mind whether or not they will serve him will at election time. The only other thing I would like to say, besides endorsing in full, is that I would like at a later time, in Section 9 and 10, when we come to it, to offer some slight amendment.

PRESIDENT EGAN: Mr. Davis.

DAVIS: Mr. President, Mr. Hurley has a point here when he says that only the attorneys have been speaking in this matter. I am an attorney but I want to speak on this amendment because the matter is absolutely fundamental. If Mr. McNealy's amendment proposed to Section 4 should be adopted, of course the whole approach to the matter of the selection of the judiciary would be different. We would have to start out and do it all over again. Now that would be all right, too. Merely the fact that the Committee has put in a proposal here is certainly not governing on this body. But at this time we are going to have to decide, by this body, as to whether it is the will of the Convention that judges be appointed, or as to whether it is the will of the Convention that judges be elected. After we decide that, one way or the other, then we can go into the other matters as to how they are appointed or as to how they are elected, in either case. Now historically, judges were

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always appointed until some time after the adoption of our Federal Constitution, and our Federal Constitution included that procedure in providing that judges are appointed and, in fact, are appointed for life. And, of course, the theory being appointing judges for life is that they are once appointed, completely independent, and over the years we have seen many times when a President attempted to what we might call, "pack" the Supreme Court. The President has appointed his man or his men with a particular idea in mind, and when those judges were appointed, I think invariably or at least almost all the time, the President in question has been badly disappointed to find that his man followed what he conceived to be the law and not the President's wishes. The lifetime tenure of judges has much to recommend it. On the other hand, the lifetime tenure of judges has the possibility of being abused. Any attorney who has practiced law has seen instances where a judge appointed for a lifetime, after serving for a length of time, becomes completely unresponsive to the will of the people, refuses to change with the times and the times do change. And for that reason, strict appointment with a lifetime tenure, has its disadvantages. With that in mind then, sometime shortly after the adoption of the United States Constitution, many of the states started electing their judges with the idea that the judges would be more responsive to the public will. And the pendulum, as somebody said awhile ago, swung clear over to the other side and we had very nearly all our judges except our Federal judges being elected by the people and for relatively short terms. I grew up in the State of Idaho and we had elective judges. Their terms, even the supreme court judge terms, were only four years. The judge ran every four years and inevitably it got into politics. In order to attempt to remedy that situation, the State of Idaho many years ago adopted a nonpartisan judicial ballot where the judge runs, not as a member of the party, but runs for the office. However, he runs against some other person who aspires to be a judge and he runs every four years. The result was that the judiciary was not and could not be independent, depending on the whims of the time. Depending on the decisions a man might have made, he was or was not retained, or depending on how popular his opponent might be, completely irrespective of qualifications. Now the elective system has much to recommend it, but likewise, it has much against it. In the creation and maintenance of an independent judiciary, and I believe without qualification, I believe I could say that all of us here want an independent judiciary, a judiciary that will not be swayed by the public will at any particular moment, a judiciary that will not be subject to pressure from the executive branch of the government. I moved to Alaska some sixteen years ago and from that time to this I have been operating under a judiciary which was appointive. However, appointed for a very short term of four years, and I am willing to state flatly in my opinion that system will not work. I have seen instances where judges were

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appointed who had no qualifications at all to be judges. They were appointed either by reason of a compromise--they were the only ones everyone could get together on--or for some other reason. In at least one instance, I saw an instance of a judge appointed who was a good judge and who was doing a good job as judge. In the particular case I have in mind the judge made a decision against the United States of America, in my opinion a completely proper decision, but a decision against the United States of America. When he came up for reappointment at the expiration of his four years he was not reappointed, and a judge was appointed who it was believed would follow what the government wanted and I know that we do not want that. Now the plan which has been presented here is a compromise between the plan of appointing judges for long terms and a plan for election of judges. In my opinion, it has the best features of both. Now Mr. McNealy said, when he was talking, that the fact that a judge may be appointed, may be elected rather, might be an entirely a good judge and that the fact that judges are elected is not any argument that the elected judges are inferior, and I will admit that in a minute--and I also will admit that the fact that judges are appointed does not necessarily guarantee that they are superior judges, but it seems to me that the plan which is set up here gives the best of the two systems with the result that when the procedure is followed we have taken the best means yet devised to appoint and select qualified judges and to keep judges free from outside pressures and to get rid of judges who are not able to properly do their job. I hope that Mr. McNealy's proposed amendment will be defeated.

PRESIDENT EGAN: Mr. Metcalf? If there is no objection, the Convention is at ease for a moment while the steno typist changes her machine.

RECESS

PRESIDENT EGAN: The Convention will come to order. Mrs. Sweeney?

MRS. SWEENEY: Mr. Chairman, in view of the fact that they are going to take our desks from us in a few minutes, I would like to move that we recess until 1:30 this afternoon and that Mr. Metcalf be the first speaker when we resume discussion.

PRESIDENT EGAN: Mrs. Sweeney asks unanimous consent that owing to the fact that the University people will have to get these tables out of here in a few minutes, that the Convention stand at recess until 1:30 p.m. and that Mr. Metcalf, who was

recognized, have the floor at the time. Is there objection? Hearing no objection, the Convention stands at recess until 1:30 p.m.
RECESS
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PRESIDENT EGAN: The Convention will come to order. Mr. Kilcher?
MR. KILCHER: Mr. President, I move that the Rule 35, pertaining to the previous question, be referred to the Rules Committee for further study.
HELLENTHAL: I second the motion, Mr. President.
PRESIDENT EGAN: Did you ask unanimous consent, Mr. Kilcher?
KILCHER: Yes.
PRESIDENT EGAN: Mr. Kilcher moves, seconded by Mr. Hellenthal, unanimous consent is asked that Rule 35 pertaining to the previous question be referred to the Rules Committee for further study. That does not mean at this time, Mr. Kilcher, but that they report at the next plenary session?
KILCHER: Yes.
PRESIDENT EGAN: If there is no objection, it is so ordered. Mr. Metcalf, I believe you have the floor on Mr. McNealy's proposed amendment.
METCALF: I am one of the lay members of the Judiciary Committee and I wish to speak briefly, make a few remarks in opposition to Mr. McNealy's amendment. I would not argue that this proposal submitted is perfect. Anything that is man-made is certainly not perfect. For instance, you go up in an airplane and you don't know for sure you are going to get down in one piece or two, so there can be defects--in anything that is man-made. I am of the sincere belief that this proposal that the Committee has brought out as a result of the thinking of all seven members of the Committee is as near perfect and workable as possible. There is something that I would like to bring out that has not been brought out already. As an experience, I have had almost fifteen years experience in serving with the Justice Department and as part of that I had charge of the jail at Seward for nearly fourteen years where we had from three to thirty inmates in the jail. Here is an observation from having a ringside seat of all this activity going on and taking part in it. I wish to make an observation that there is a great lack of uniformity in the distribution of justice and it is also my personal observation that lack of uniformity is due to probable pressures being exerted. Perhaps people who are fortunate to be wealthy can employ extra good lawyers and put on a real good case before the court and jury and thereby a man with money gets a lighter sentence than the person who does not have money. That is my criticism of the judicial system--lack of uniformity. To illustrate roughly, maybe I have seen a man get ten years for manslaughter for killing a man and another sentence maybe fifteen years for just shooting a
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leg off. There is lack of uniformity. So speaking sincerely from my heart, I would like to see and I believe this proposal here does it, it makes the judiciary courts strictly nonpartisan and as near independent so that they can be fearless and interpret the law equal to all and special privilege to none, and I am certainly in accord with the sentiments expressed by my fellow members of the Committee.
PRESIDENT EGAN: Is there further discussion? Mr. Barr?
MR. BARR: Mr. President, we have heard from several able attorneys whom I consider experts in the judiciary. I am certainly not an expert. However, we must bear in mind that the courts are established for the benefit of the public and I am a member of that group. I would like to speak form that viewpoint. Now the chief value of a judge on the bench to the public is the work he does, the decisions he renders. He should have in qualifications, first, ability and experience. Secondly, he should have integrity and a willingness to render impartial decisions. Of course, the first, the ability, is without value unless he also has integrity. We have before us two methods of selecting the judges--by appointment or by election by the people. Now, I will not deny that a little political consideration at least, might enter into both methods. Of course, our interest here is to select that method with the minimum of political consideration or nonpartisanship of any kind. Under the proposed method in this Committee Proposal, whereby he is appointed by the governor, I would like to point out that two candidates are submitted by the judicial council and the governor approves of one and disapproves of the other. In other words, that is tantamount to appointment by the judicial council with approval by the governor since he has only two to select from. If anyone is going to appoint the judges, it certainly should be the experts who understand his duties more than any other group. On the other hand, if he has to campaign in election (and if he expects to win, he will have to campaign vigorously like any other candidate), some campaigns cost quite a bit of money, he may accept campaign contributions which in itself is perfectly correct as long as they are contributions and not payment and there will be certain groups backing him and others against him, certain individuals likewise. When he is elected, he may be impartial. It is hoped he will be. But he has less a chance to be impartial after being backed or opposed by certain people and I would not like to put the judge in the position of having that tension of feeling that he should be grateful, even if he does nothing about it. Another thing, during the campaign if he expects to win, he is going to have to make speeches to the people to point out why he should be elected., he might even be asked to make campaign promises. He will be asked to make statements which might amount to commitments. Then after he is on the bench he can't forget those statements. He is supposed to live up to them. That is not right. A judge should be free in every way, after he is on the bench, to render a decision. Now in examining these two
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different methods of selecting a judge--first, if he is appointed by a judicial committee and approved by the governor, he should have these two qualifications--ability and integrity. It is certain, almost one hundred per cent certain, that a man with ability will be selected. If he campaigns and that election goes to the people, that is not so certain because the candidacy will be open to any attorney. There are attorneys of all degrees of fitness for that office, of course. On the other hand, if the judicial council appoints a man, there is no guarantee of his integrity, but certainly these people are well acquainted with him and there is a greater guarantee than if he were selected by popular vote. So in balancing one method against the other, in my own mind I would say that by election you have no guarantee whatever of ability. You do have nearly one hundred per cent guarantee if appointed. In integrity, you have no guarantee whatever of integrity in election. In appointment you have some guarantee of integrity. I believe that this Committee report that outlined the system of selection of our judges which is just about as perfect as can be, it's not perfect, nothing's perfect, but I think it is a system we want in the Territory.
PRESIDENT EGAN: Mr. Hellenthal.

HELLENTHAL: Mr. President, at this moment we are at the heart of the problem of creating an independent judiciary. Some of us have not always been proud of segments of the legal profession in Alaska, but at this moment I am very proud of this Committee of five lawyers and two laymen who have recommended this plan and this proposal to us. If this proposal is adopted, I shall be and shall continue to be proud of not only the legal profession in Alaska, but of the Alaskans who in their search for an independent judiciary have drawn the very best from the studies and the constitutions of forty-eight states and have rejected the poor and the second rate. I hope that in substance that this proposal will be adopted by this Convention.
SUNDBORG: Mr. President, may I have permission to address a couple of questions to the speakers who have spoken on this issue just for the purpose of clearing up a few points?
PRESIDENT EGAN: If there is no objection, Mr. Sundborg, you may address the questions.
SUNDBORG: I was wondering, Mr. McLaughlin, if you know whether in states which do have a plan such as this, which I understand is generally designated as the Missouri Plan, in such states as a matter of practice, does the electorate ever, or very often, vote out of office a judge who is in office when the question comes up?
MCLAUGHLIN: As a matter of fact, I will refer you back to the sheet that was prepared for this Convention by the Public
*** Page 603 ***
Administration Service and I believe that in there they specifically point out that in Missouri, they have, in fact, repudiated judges at the polls. Is that a startling thing? It is indeed. My own state (the state of New York--when I say my own state, where I am also admitted in addition to Alaska) between the time of the adoption of the constitution until very recently, I think they had seventeen attempts at removal of judges and only twice did they succeed and I am sure by that time the man was in a padded cell. Does it work? Yes. They do repudiate them at the poll. In Missouri, yes, they did repudiate them at the polls.
SUNDBORG: Thank you. Now, Mr. Taylor, earlier in the Convention I happened to watch one of the television programs when the Judiciary Committee was holding a meeting and as I remember it, you spoke quite strongly in favor of electing judges. I take it from your remarks today you have been won around to the other view that it would be better to appoint judges. Is that correct?
TAYLOR: No, that is incorrect, Mr. Sundborg, because I introduced a proposal here which to a great extent is embodied in this now and I was in favor of the Missouri Plan. In fact, when I was running for the legislature, I was very emphatic in my stand upon the adoption of the Missouri Plan or something close as possible to it.
SUNDBORG: I see. Mr. McNealy, I was wondering in case your motion should prevail to strike this and other sections, do you intend to substitute anything else in their place or would you just leave that part of the constitution silent?
MCNEALY: It would be necessary to rewrite a section covering elections rather than appointments.
HINCKEL: May I direct a question to Mr. McLaughlin?
PRESIDENT EGAN: If there is no objection, Mr. Hinckel, you may address your question to Mr. McLaughlin.
HINCKEL: Was consideration given to appointment by the judicial council with the governor to have veto power?
MCLAUGHLIN: Consideration was given to the appointment by the judicial council with the governor to have veto power, but it was believed that in order to balance up the powers, that the governor have some choice in the matter, that is, the executive branch have some election in the matter. As I say, the Committee was reluctant to recommend anything of a material nature which did not have prior precedent and the benefit of experience so that we could adjudge its value.
PRESIDENT EGAN: Mr. Kilcher.
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So chooses. However, in going into the Robert's Rules of Order, the brown book where everything is explained explicitly--it goes much further than these books that we have--and on the question of the previous question, Robert's Rules of Order goes into that in a quite lengthy order and it gives the chairman of any parliamentary organization considerable latitude as to how he shall treat the question at the time it is put. In other words, in general procedure some judgment is left to the chairman as to whether he will allow immediate closing of debate without having information make available to the assembly and that is precisely what was done this morning because maybe the Chair felt that some members did not realize they were closing debate when there were other members on the floor who were seeking that privilege. If there is no further debate on this motion–Mr. Robertson?
ROBERTSON: Mr. Chairman, inasmuch as I am one of the advocates of this proposal, I staunchly advocate it now but I would like to again emphasize that Section 4 is the keystone of the entire structure of this proposal and I would like to also state and call it to the Convention's attention that we had the advice on several meetings of Mr. Elliott on this proposal and it was only drawn and prepared after consultation with him and a good deal of investigation and I suggest to the Convention that it guarantees a strong, fearless, independent judiciary and I hope that Mr. McNealy's amendment may be voted down.
PRESIDENT EGAN: Is there further discussion of this proposed amendment by Mr. McNealy? If there is none, then the question is, "Shall Mr. McNealy's proposed amendment, the deletion of Section 4 from Committee Proposal No. 2, be adopted by the Convention?
JOHNSON: I request a roll call.
PRESIDENT EGAN: Mr. Johnson requests a roll call vote. The Chief Clerk will call the roll. Mr. Londborg?
LONDBORG: I would like to express my privilege of not voting in this matter.
PRESIDENT EGAN: Mr. Londborg requests the privilege of not voting on this matter. The Chief Clerk will call the roll.
COOPER: Mr. President, before the roll is called, as I understand the rules, any five delegates can now request any other delegate to state his reason for not voting. If there is doubt in any one delegate's mind, I would like to know what the doubt is, if there is still a doubt, possibly something overlooked, that wasn't brought on the floor. I would like to know. I am one, I would like to have four others.
PRESIDENT EGAN: You are asking Mr. Londborg why he is not...
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MCCUTCHEON: Question.
PRESIDENT EGAN: The question is, "Shall Mr. McNealy's proposed amendment deleting Section 4 from Committee Proposal No. 2 be adopted by the Convention?" The Chief Clerk will call the roll.

(The Chief Clerk called the roll with the following result:
YEAS: 2- Laws, McNealy.
NAYS: 51- Armstrong, Awes, Barr,
Boswell, Coghill, Collins,
` Cooper, Cross, Davis, Doogan,
Emberg, V. Fischer, Gray,
Harris, Hellenthal, Hermann,
Hilscher, Hinckel, Hurley,
Johnson, Kilcher, King,
Knight, Lee, Londborg,
McCutcheon, McLaughlin,
McNees, Marston, Metcalf,
Nerland, Nolan, Nordale,
Peratrovich, Poulsen,
Reader, Riley, R. Rivers,
V. Rivers, Robertson,
Rosswog, Smith, Stewart,
Sundborg, Sweeney, Taylor,
VanderLeest, Walsh, White,
Wien, Mr. President.
ABSENT: 2- Buckalew, H. Fischer.)
CHIEF CLERK: 2 yeas and 51 nays and 2 absent.
PRESIDENT EGAN: So the motion has failed. We now have before us Section 5. Mr. McNealy?
MCNEALY: At this time, I would move and ask unanimous consent that the balance of my amendments as to further sections be withdrawn from consideration.
PRESIDENT EGAN: Mr. McNealy moves and asks unanimous consent that the amendments he offered to other sections be withdrawn. Is there objection? Hearing no objection, it is so ordered. Mr. Victor Fischer?
V. FISCHER: I still have one question on Section 4 if I may ask the Chairman of the Judiciary Committee.
PRESIDENT EGAN: If there is no objection, you may address your question to the Chairman of the Judiciary Committee, Mr. Fischer.
V. FISCHER: In Section 4, it states the justices of the supreme court will be appointed by the governor. In Section 2, there is a reference to the supreme court consisting of three justices, one of whom is chief justice. Who appoints the chief justice?
MCLAUGHLIN: I believe that is covered further. Actually, he
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is appointed by the governor. It is covered in some future provision. There is a phrase--
PRESIDENT EGAN: Section 9 would probably take care of that. Mr. Victor Fischer?
V. FISCHER: Upon further reading, I notice on page 4 on line 3, it generally--in that top there, it refers to the judicial council submitting to the governor nominees for appointments to fill initial vacancies including the office of chief justice. It is segregated in the initial appointment.
PRESIDENT EGAN: Are there amendments to Section 5? Mr. Victor Rivers?
V. RIVERS: I have an amendment.
PRESIDENT EGAN: The Chief Clerk may read the amendment.
CHIEF CLERK: "Page 2, line 8, strike the word 'ten' and insert in lieu thereof the word 'six.'"
PRESIDENT EGAN: What is the pleasure of the body? Mr. Victor Rivers?
V. RIVERS: I move that the amendment be adopted.
PRESIDENT EGAN: Mr. Victor Rivers moves that the proposed amendment be adopted. Is there a second to the motion changing the word "ten" to read "six?"
SUNDBORG: I will second the motion and I would like to ask the Chairman of the Judiciary Committee how the practice that is specified in the article embraced in Committee Proposal No. 2 compares with that of other states as to the length of time between these elections?
MCLAUGHLIN: As I presume, the question is, why did we determine that the judges of the supreme court should serve ten years. I personally voted for twelve. The Committee decided that ten was the average and the Committee, when it decided that ten was the average, followed the recommendation of the conference of the Chief Justices of the United States, at which they recommended that the term of judges of the appellate courts be not less than ten years. In fact, as I say, I reduced it two years and Mr. Robertson decreased his an intangible amount, from life-time to ten years. As the practice is in other courts, that is those which have revised their judiciary article in recent years, California, the supreme court has a term of twelve years. All justices of the supreme court, district court--that is the intermediate appellate courts--is twelve years and the superior court, which is the trial court, is six years. In New Jersey, the supreme court judges hold for seven years
*** Page 612 ***
and upon reappointment, they hold for life subject to removal, that is during good behavior and until the age of seventy. That is Article 6, Section 6, Subdivision 3 of the New Jersey State Constitution. In Missouri, the supreme court justices hold for twelve years. The circuit judges hold for six years. That is under Article 5, Section 29, C-1 of the Missouri Constitution, which has recently been amended. Under the Hawaii Constitution, under Article 5, Section 3, judges of the supreme court seven years, circuit court six years. It is the feeling of the Committee, because of the selective process, that is, screening for initial appointment and the fact that four years thereafter, every judge, that is, a maximum of four years, every supreme court judge and every superior court judge would be up for re-election, that there would be enough of a public control over them that long terms would be more desirable. How do these compare with the United States? Generally throughout the United States, the figures are being upped. They are giving longer tenure to their judges, but it was on the basis of the fact that the chief justices

of each state court has recommended as a minimum judicial standard the figure ten, the Committee adopted that figure. As I say, many Committee members consented to reducing it because of the re-elective system process we have.
PRESIDENT EGAN: Is there further discussion? Mr. Victor Rivers.
V. RIVERS: Mr. Chairman, in adopting the Section 4, we adopted the appointive process for judges and of course, I think the meat of that whole thing settled down to the fact that it was not an appointive process so much, but how they were appointed. Now I did not notice very many of the law members referring to past history. There was some brief reference to it, but perhaps that is because we do not enjoy on this floor certain privileges of immunity. However, I think if we look at appointive systems as such, our experience as Mr. Davis pointed out has been very poor. Now we have adopted the appointive system and the only difference is the method by which we select the judges for appointment. We have had judges in the past in the Territory under this appointive system, of course they have handled both Federal and the Territorial business. We have had some fine judges. We have had some men that were average and mediocre and some that many people considered very poor, but we are setting up now an entirely new system of justices. We have had the situation in the past where to make an ordinary appeal from the ruling of one of these courts would cost anywhere from $2000 to $3000. You would have to go down and have your transcript made and have your attorney go to San Francisco and of course you were practically--if you were an average citizen, foreclosed from having an appeal. But at this time we are setting up a system of justice at which we will now have under our direct jurisdiction, or at least within reach, the judges whom we appoint to these various positions and they
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are subject to put their name before the electorate in the first three years they are appointed. Now we ask that the judge sit inviolate in that position for ten years. If he is a good judge, a fair and just judge, it is my opinion that he should have no fear in going before the electorate because it has been by observation that a man who sticks to his principles and does not compromise principles with expediency and is generally known to be honest will even be elected and re-elected to political office. Six years is a term for which we elect a senator. It seems that these men, if they are good judges and there is no reason for recall, if the recall method as set up in here has failed to function, it might be very well to put their name before the electing body. They are appointed, we have given a strong appointive power to the judicial council. I am happy to see there is a certain layman representative group on that council. It seems that the least thing we can do now to offset this appointive power is to have a fairly strong or fairly liberal interpretation of the powers of electing these men as they run against themselves. It does not seem to me it is working any hardship on a man's tenure of office or on his feeling of security or on his ability to perform his duties by asking he get up and have his actions approved every six years without competition, by the electorate. It seems to me to be a much more democratic system of putting him in a position such that he's practically unremovable for--well, twenty years is probably the average productive life of a man who has gone through college and who has finally got himself in a position to be a judge. I don't expect his expectancy would be much more than ten years or possibly fifteen years after he had become a judge. So we are practically giving an appointment in that position for life after he has once appeared before the electorate. I notice that Hawaii set up a period of seven years, quite evidently a compromise figure, because they ask the superior court judges, who are dealing with affairs much closer to the people, to appear every six years. As you know, the supreme court, as I visualize it here, will sit and act only on appeals from the court of lower decisions. There won't be a tendency to have this great wave of popular support swing for or against them after decisions in court because their decisions are so much fewer than the court's decisions that are made in the lower courts. I see no reason why we should not consider confirming these judges to offset the appointive power resting in the hands of a judicial council. Consider letting their names come before the electorate every six years. It seems to me fair and somewhat considerably more democratic than keeping them in there for the longer period. I also want to point out that, as we start off in the statehood picture, as it is in many other layers of our society, we have a great many relatively new and younger attorneys and not very many of the more older, experienced, tried veterans to draw from. It seems to me that that is another good argument why we should have these people answer back to the electorate every six
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years. It is not imposing, in my opinion, any burden on them. If they are good judges, if they are qualified, if they are honest men doing an honest job, I should think they would be proud to put their name before the electorate. I see no reason to hold them back in this rarified atmosphere of untouchability. I think the electorate should have the chance to express their opinion on them at least every six years.
PRESIDENT EGAN: Is there further discussion on this proposed amendment? If not, the question is, "Shall the amendment offered by Mr. Victor Rivers changing the word 'ten' to 'six,' making it six years instead of ten years, for the supreme court justice to come before the electorate be adopted by the Convention?"
JOHNSON: Mr. President, I request a roll call.
PRESIDENT EGAN: Mr. Johnson requests a roll call vote. The Chief Clerk will call the roll.
(The Chief Clerk called the roll with the following result:
YEAS: 11- Cooper, Hinckel, Kilcher,
Londborg, McNealy, Nolan,
Peratrovich, Reader,
V. Rivers, Smith, Sundborg.
NAYS: 42-Armstrong, Awes, Barr,
Boswell, Coghill, Collins,
Cross, Davis,Doogan, Emberg,
V. Fischer, Gray, Harris,
Hellenthal, Hermann, Hilscher,
Hurley, Johnson, King, Knight,
Laws, Lee, McCutcheon,
McLaughlin, McNees, Marston,
Metcalf, Nerland, Nordale,
Poulsen, Riley, R. Rivers,
Robertson, Rosswog, Stewart,
Sweeney, Taylor, VanderLeest,

Walsh, White, Wien,
Mr. President.
ABSENT: 2- Buckalew, H. Fischer.)
CHIEF CLERK: 11 Yeas, 42 Nays and 2 absent.
PRESIDENT EGAN: So the motion has failed of adoption. Are there other amendments to Section 5? If not, proceed to Section 6. Are there amendments to be offered to Section 6? If not, proceed with Section 7. Mr. Sundborg.
SUNDBORG: Mr. President, I would like to ask a question of the Chairman of the Committee on the Judiciary branch with respect to Section 7, if I may. Mr. McLaughlin, I notice that Section 7 appears to require that any person in order to be eligible for appointment as a justice or judge would have to have been admitted to practice law in Alaska for at least five years, not necessarily five years preceding his nomination
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by the people under their jurisdiction.
PRESIDENT EGAN: Mr. McLaughlin, you may ask a question.
MCLAUGHLIN: Merely to confirm Mr. Hinckel, he did discuss the matter with the Judiciary Committee and we unanimously agreed that it would not change the deletion of the words, "of the state" on line 6, page 2--would not change the meaning and would effectuate the purpose that Mr. Hinckel sought. In other words, the Judiciary Committee unanimously consents.
PRESIDENT EGAN: Is there further objection to Mr. Hinckel's unanimous consent request? If not, the request has been adopted by the Convention and the words "of the State" are ordered deleted. Mr. Sundborg.
SUNDBORG: Mr. President, I move and ask unanimous consent that we recess for ten minutes.
PRESIDENT EGAN: If there is no objection, the Convention will stand at recess for ten minutes. The Convention is at recess.
RECESS
PRESIDENT EGAN: The Convention will come to order. The Chair has been informed that we have with us some of the members of the Board of Governors of the Alaska Bar Association. We have the President of the Alaska Bar, Mr. Mike Monagle of Juneau, and we are certainly happy to have you with us this morning. We are now on Section 8 of the Committee Proposal No. 2. Are there amendments to Section 8? If not, we will proceed to Section 9. Are there amendments to Section 9?
HURLEY: May I ask the Chairman of the Committee on Judiciary a question?
PRESIDENT EGAN: You may, Mr. Hurley, if there is no objection.
HURLEY: Is there in your opinion, Mr. Chairman, any possibility that the judicial council would nominate a large number of persons for selection by the governor? In other words, say ten, in which case it would, in effect, place the selection and the nomination on the governor and relieve the judicial council of any responsibility for having selected a precise panel. In other words, the fact that there is no upper limit there, would that affect that--
MCLAUGHLIN: The possibility does exist that the council could do that. Under the Missouri Plan, that is under the Missouri Constitution from which this section is derived, it reads "not less than three." It was the intent of the Judiciary Committee not to make it "not less than three" because then by law the council would be required to present three persons.
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It is the desire of the Judiciary Committee (and to some extent that had confirmation of the Board of Governors of the Alaska Bar Association) that we keep the selections down to a minimum, because of the limited number of lawyers that we have in the Territory we wanted to restrict the selection of the governor. In fact, the fear has been expressed already that initially the governor might have too much determination in selecting the judges. For that reason it was kept down to two, but with the increase in size of the state it is well recognized that then the judicial council should have latitude in submitting more than two nominations for the one vacancy.
SUNDBORG: May I be permitted to address a question to Mr. McLaughlin?
PRESIDENT EGAN: You may, if there is no objection.
SUNDBORG: Mr. McLaughlin, several days ago when we were discussing this article for the first time, as I heard you, you answered a question, asked by someone, on whether if the governor did not like the names suggested to him he could call for more names and my recollection was that you answered that in that case more names would be supplied. Was that a considered answer?
MCLAUGHLIN: That was not a considered answer. I believe that I corrected myself. (Under this article, under Section 9, the governor has no right of refusal, he cannot refuse. The obvious answer to it, that's the way the section was intended, if there was any other intent it would mean, particularly with the present status of the Alaska Bar, that if the governor refused, he would very promptly exhaust all nominees and he would pick the man that he wanted.)
SUNDBORG: Thank you, I just wanted to clear the record. May I address another question to Mr. McLaughlin?
PRESIDENT EGAN: If there is no objection.
SUNDBORG: Also with respect to Section 9, it does not mention there is an office of chief justice. Is there an office of chief justice created by this article? The reason I ask is that when a man, for instance, is appointed by the governor to the position of chief justice, does he hold that position subject to the elections every ten years and the retirement provision is in here for life, or does each governor who is elected have the right to name a chief justice from among the panel that then makes up the supreme court?
MCLAUGHLIN: There is an office of the chief justice and once appointed by the governor, he remains the chief justice for life or until removed by the voters or until retired for other cause or resignation.
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representation.
SUNDBORG: That then refers to and modifies the word, "appoint." they "appoint on the basis of appropriate area representation?"
MCLAUGHLIN: That is right.
V. RIVERS: Are members of the bar, all members of the bar, members of the "organized state bar" or is that just the American Bar Association?

MCLAUGHLIN: The "organized state bar" was a generic term the Committee took as best representing what would be a statewide organization of attorneys. Originally the Committee did have the expression "The Alaska Bar Association or its successor." The difficulty was that the legislature could terminate the organized bar, that is terminate the integrated bar and we use the "organized bar" as best representing that association which would represent all the attorneys of the Territory.
V. RIVERS: "Organized state bar" would not necessarily imply that all members admitted to the bar then were members of that organized bar, is that right?
MCLAUGHLIN: That would imply this, that all could belong to it.
PRESIDENT EGAN: Mr. Hurley.
HURLEY: Mr. President, I would like to address a question to Mr. McLaughlin. My question really has reference to Section 11 but affects Section 10. In Section 11 you mention that "the chief justice shall thereafter be ex officio a seventh member and the chairman of the judicial council? And then mention that it requires an affirmative vote of four of its members. Does the term "ex officio member" restrict his voting rights in that group?
MCLAUGHLIN: It does not restrict his voting rights at all.
HURLEY: In the matter of a tie he would have a vote?
MCLAUGHLIN: He does anyway.
PRESIDENT EGAN: Mr. Smith.
SMITH: I would like to address a question to Mr. McLaughlin. I am just a little curious as to the Committee reasons for providing that the organized state bar shall appoint the three attorney members and that the governor shall appoint the three nonattorney members.
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MCLAUGHLIN: The reason, Mr. President, for that is that is the very essence off the so-called Missouri Plan. The three who are appointed by the bar represent a craft in substance, the theory being, and it has worked out in Missouri, that they best know their brothers, and they are there based solely on their professional qualifications but selected because they would represent, in theory, the best thinking of the bar and they are there solely because they represent their craft. In essence, there is nothing undemocratic about it because of the fact that we know by its very nature that the judges of the supreme and superior court will be attorneys. The three lay members are in substance those who represent the public. Under the Missouri Plan there is a specific provision that the members appointed by the bar of Missouri shall be elected. They specifically use the word "elected." we didn't use it, we did not deem it necessary. Under the Missouri Plan, the three laymen are appointed by the governor. There is a difference in this Section 9 in the sense that the laymen under our Section 9 are required to be approved by the senate. That is, they are subject to confirmation by the senate. The reason that varies from the Missouri Plan is that what happened was in Committee there was quite some discussion about the popular representation.
DAVIS: Mr. President, before he goes ahead, he is talking about Section 9. I am sure he meant Section 10. I would like it to be clear.
MCLAUGHLIN: Do you desire me to proceed, Mr. President, or wait until that arises?
PRESIDENT EGAN: It might be, inasmuch as the question has arisen, that if there is no objection Mr. McLaughlin could proceed. Mr. Fischer?
V. FISCHER: I would like to give cause to the question to arise by introducing an amendment on this subject.
PRESIDENT EGAN: Mr. Fischer, you may introduce your amendment at this time. The Chief Clerk will read the proposed amendment.
CHIEF CLERK: "Section 10, page 3, line 22, strike the comma after the work 'article,' substitute a period and strike the remainder of the sentence."
V. FISCHER: Mr. President, I move and ask unanimous consent for the adoption of this motion.
MCCUTCHEON: I object.
COGHILL: I second the motion.
PRESIDENT EGAN: Objection is heard. Mr. Coghill seconds the motion. The question is open for discussion. Mr. Fischer?
V. FISCHER: I would like to briefly say that I believe the confirmation requirement is not necessary and is in a way...
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. . .
PRESIDENT EGAN: Mr. Coghill, it might be more in order if you ask that your original amendment be withdrawn and then submit it. There will be no confusion in the minds of the delegates when we vote on it, if that is what you are attempting to accomplish.
COGHILL: Yes, that's right. I will so move and ask unanimous consent that my proposed amendment be withdrawn.
PRESIDENT EGAN: Mr. Coghill asks unanimous consent that his original proposed amendment be withdrawn. Is there objection? Mr. Riley?
RILEY: I object for purposes of comment. It would appear to me to be far more expeditious to act on it as first offered. Otherwise we are going to introduce the complication of, do we rescind our former action to put the show on the road. This could all be reconciled in Style and Drafting later if Mr. Coghill's motion is adopted.
SUNDBORG: I agree with that, Mr. President, and withdraw my suggestion.
PRESIDENT EGAN: Mr. Sundborg then asks unanimous consent that his motion be withdrawn. If there is no objection, it is so ordered and we have Mr. Coghill's original motion before us. Mr. McLaughlin.
MCLAUGHLIN: I presume Mr. Coghill submitted this motion merely for the purpose of getting this on the floor coldly and calculatingly. If this motion is passed, you might as well tear up the whole proposal and provide for the election of juries because then it would be more efficacious and more democratic. The whole theory of the Missouri Plan is that in substance, a select and professional group, licensed by the state, can best determine the qualifications of their brothers. The intent of the Missouri Plan was in substance to give a predominance of the vote to professional men who knew the foibles, the defects and the qualifications of their brothers. It is unquestionably true that in every trade and every profession the men who know their brother careerists the best are the men engaged in the same type of occupation. That was the theory of the Missouri Plan. The theory was that the bar association would attempt to select the best men possible for the bench because they had to work under them. If you require a confirmation of your attorney members you can promptly see what will happen. The

selection is not then made by the organized bar on the basis of a man's professional qualifications alone. The determination of the selection of those people who are on the judicial council will be qualified by the condition, are they acceptable to a house and a senate or a senate alone, which is essentially Democratic or essentially Republican. No longer is the question based solely on the qualification

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of the candidate for the bench. The question is, will those people whom we set up here on the judicial council, that we send from the bar, will they be acceptable in terms of political correctness? If political correctness enters into the determination of the selection of those professional members who are to be placed upon the judicial council, the whole system goes out the window. All you have is one other political method of selection of your judges. The theory, and it is the only way it can possibly work, is that the lawyers are put on there to get the best man and not to take a man on the basis of his politics. But if we require confirmation, then the material consideration to be made by the Alaska Bar Association is, are we sending our best representative--no. But are we sending a good Democrat acceptable to both members to both houses or are we sending a good Republican acceptable to both houses. If we permit that determination to enter into our consideration, then in substance we should provide for an initial election or initial appointment by the governor or some other body. Qualifications go out the window as soon as you have confirmation. The theory on the lay members on the confirmation, they represent the public and they represent the predominant political thought. The theory on the lawyer members of the council, they represent the profession, they represent the best interests of the profession. They represent a desire to have the best judges on the benches. I beg of you, please don't vote for the amendment.

PRESIDENT EGAN: Mr. Ralph Rivers.

R. RIVERS: I want to heartily second the remarks of Mr. McLaughlin, but also want to point out that the purpose of the draft as now written is to have a nonpartisan selection of these lawyer members and the minute you adopt something like this, you are making a partisanship proposition out of it. We want that to carry through to a nonpartisan selection of judges, so I think our thinking is quite clear.

PRESIDENT EGAN: Mr. Coghill.

COGHILL: In bringing this up, I quite agree with both the Chairman of the Judiciary Committee and also the member. I believe that all of us here are working on committees real hard and we are trying to bring out good and concise thoughts. We are not trying to go to the extreme in our committee proposals, so that we will get a compromise on the floor. I don't think that is the intent. The purpose for this amendment is that I foresee that the nonattorney members of this board are going to be subject to all the ills of political skulduggery on the floor of the senate or the joint house assembled, and I see that if we are going to pick the judges on nonpartisan basis, that it should be left up to your representative of the government, the highest official in the executive branch which is your governor. That is the reason

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why I voted for the amendment to strike that, the acceptance or confirmation by the senate. I think if we are going to accept some of them by the senate confirmation, we should accept them all. It is the precedent you are setting up here for boards on the professional level.

UNIDENTIFIED

DELEGATE: Question.

PRESIDENT EGAN: The question is, "Shall Mr. Coghill's proposed amendment be adopted by the Convention?"

ROBERTSON: Roll call.

PRESIDENT EGAN: The Chief Clerk will call the roll.

(The Chief Clerk called the roll with the following result:

YEAS: 4- Coghill, Kilcher, Londborg,
Mr. President.

NAYS: 49- Armstrong, Awes, Barr,
Boswell, Buckalew, Collins,
Cooper, Cross, Davis, Emberg,
V. Fischer, Gray, Harris,
Hellenthal, Hermann,
Hilscher, Hinckel, Hurley,
Johnson, King, Knight,
Laws, Lee, McCutcheon,
McLaughlin, McNealy, McNees,
Marston, Metcalf, Nerland,
Nolan, Nordale, Peratrovich,
Poulsen, Reader, Riley,
R. Rivers, V. Rivers,
Robertson, Rosswog, Smith,
Stewart, Sundborg, Sweeney,
Taylor, VanderLeest, Walsh,
White, Wien.

ABSENT: 2- Doogan, H. Fischer.)

CHIEF CLERK: 4 yeas, 49 nays and 2 absent.

PRESIDENT EGAN: So the proposed amendment has failed.