

9440 Patricia Pl.
Juneau, AK 99801

March 6, 2014

Representative Wes Keller
Chairman, House Judiciary Committee
Alaska State Representatives
Juneau, AK 99801

Dear Representative Keller:

Your efforts to increase the transparency and accountability of the Alaska Judicial Council through HJR33 are appreciated. Although I don't believe the Council's process is broken, I do believe it can be improved.

During the Constitutional Convention, there was great effort to maintain integrity in selecting judges for the State. I believe the Constitutional framers wanted to balance individual merit with the political concerns of gubernatorial appointment. The simplest way to rectify any appearance of overweighting Judicial/lawyer influence over which names are forwarded to the Governor for consideration, is that whenever there is a tie vote between the attorney and public members, the Supreme Court Justice is not put in the position of breaking that tie. The applicant's name would simply be forwarded to the Governor. Rather than remove the Supreme Court Justice completely as a tiebreaker, he or she could articulate his or her recommendation reasons (either to support the nominee or not) to the Governor where there is a tie vote. This public recommendation would be submitted to the Governor with the forwarded name. I see no downside to providing a Governor with the few additional names that will result from these tie votes.

I don't believe there is a need to increase the membership of the Council for many of the same reasons former Justice Carpeneti stated in his comments. Increasing members would dilute or degrade the vetting process. The vetting process allows each member to question each applicant in depth. With many more members, this process would become superficial and not in depth as it is now.

I have recommended the Council be more vigilant and open in its business. In this regard, we could make all of our votes public and post the votes on our web page.

You might consider removing the restriction prohibiting a state or federal employee as a member on the Council.

The number of applicants we receive per judicial opening has increased substantially. I believe there is a need to amend our Constitution to allow the Council to forward the names of more than two applicants to the Governor when there are more than eight applicants for a judgeship. In my time on the Council and the recent past, there has been controversy over the current requirement that the Council forward at least two names.

Whatever changes may be made to the Alaska Judicial Council, I will uphold my responsibilities under the Constitution and statute to serve my fellow Alaskans.

Sincerely,

Ken Kreitzer

cc: Members of the Alaska Judicial Council

TESTIMONY OF DAVID JENSEN on SJR21

My name is David Jensen, I live at 11533 Tanglewood Lakes Circle, Anchorage, AK 99516

I am testifying in regard to SJR21. I have been an executive in Alaska for 40 years, most of that time with private, for-profit corporations.

I am business executive with no connection to the legal system and no involvement with politics. It is from the viewpoint of a business executive that I offer my testimony regarding SJR21.

I think that SJR21 is a bad idea, and will be bad for private business in Alaska, and here is why. As a business executive, I tried to keep the affairs of the companies that I ran out of court. But sometimes there was no alternative, and when that happened, all I expected was a judge who was impartial and professional.

I was not disappointed by the Alaska court system, because every time that I did have to go to court, I got a judge who was impartial and professional, with no private agendas or axes to grind. I did not agree with every decision made by every judge in every case I was involved in, but I always felt that the judge was impartial and professional.

It was always a comfort to me to know that the judges in Alaska get to be judges in part because they are well regarded by their fellow professionals. I would never go to a doctor unless I knew that he was well regarded by his colleagues in the medical profession, and I feel the same way about lawyers and judges.

The practical effect of SJR21 will be to remove professional qualifications from the selection of judges and to substitute political loyalty for it. In making appointments to the Judicial Council, the governor will appoint people who are loyal to him, to his party, and to his way of thinking. Those people will owe their appointment to him, and will repay him by sending him the names of judicial candidates who are loyal to, and allied with, the governor. And he will appoint those people,

based on their political loyalties instead of their professional qualifications.

In a complicated commercial dispute, I could care less about a judge's political leanings: I want a judge who is smart enough, and well regarded enough in the profession, to sort through the complicated commercial tangle and come up with a decision that gives certainty to businessmen who are trying to run a business, plan their investments, and make a profit. What I do not want, is a political hack who has no professional qualifications other than that he is a friend of the governor.

If SJR21 is approved and the constitution amended, the effect will be to centralize power over the judiciary into the governor's office. The checks and balances that the framers built into the constitution will be weakened because the judiciary will no longer be a truly independent branch of government.

Finally, the supporters of SJR21 need to remember that the tides of politics come and go. The pendulum will swing one day, to a different group of political thinkers and leaders. When that happens, if power over the judiciary is centralized in the governor's office, the judiciary will change as well.

The private sector is best off if it has professionalism, neutrality and certainty in the judicial system. A judicial system that changes with the changing winds of political thought is a drag on the economy and destructive of true prosperity. When I was the Vice President at Reeve Aleutian Airways, I had occasion to deal with a political judiciary, because Reeve ran routes to Russia. And I bear the scars to prove that the political nature of the Russian judicial system made for an incredibly difficult business environment. Let's not move in that direction here.

Thank You



DORSEY

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March 6, 2014

VIA EMAIL: Representative.Max.Gruenberg@akleg.gov

Representative Max Gruenberg
Committee Member
House Judiciary Committee

Re: HJR 33 Public Testimony

Dear Rep. Gruenberg:

I write in opposition to proposed House Joint Resolution 33 (HJR 33) which would seek to amend the Alaska Constitution to increase the number of members on the Judicial Council.

My name is Robert Bundy. I am an attorney who has practiced law in Alaska since 1972. I served the Alaska Department of Law as Chief Assistant District Attorney in Anchorage and District Attorney in Nome. I served as United States Attorney for the District of Alaska from 1994 to 2001. I have been in private practice in Anchorage since 1984 representing individuals and companies in complex federal and state civil and criminal litigation.

Over the last 42 years I have tried over 200 cases to juries in Alaska and have appeared in countless hearings, arguments, settlement conferences and other proceedings before Alaska judges in all four judicial districts. I have had a ring-side seat to observe the quality of judges who passed through the Alaska Judicial Council since statehood and who were appointed by all of Alaska's governors. I have to say, with a few notable exceptions, the quality of men and women before whom I have appeared has been extraordinary. Of course, I didn't always agree with the way the judge interpreted the law or the facts in any particular case, but I never had any reason at all to doubt the judge's overall legal acumen, integrity, work ethic and commitment to the rule of law. Over all, it would be hard to imagine how a better group could have been chosen.

I think the lion's share of credit for the quality of our judiciary can be given to the Alaska Judicial Council and its rigorous screening process. The Council looks not just to the applicant's academic qualifications and breadth of experience, both of which are very important, but also to the other important qualities such as lack of arrogance, judgment, work ethic, life experience in finding not just good candidates, but the best. The result of the Council's rigorous screening is a first rate judicial branch.

It seems to me that the proposal to expand the size of the Council would only serve to politicize and hamper the Council's work. Once politics and ideology enter consideration, the critical focus on the proven characteristics of a good judge become obscured. During my over 15 years as a prosecutor in the courts of Alaska, I was at times unhappy that the Council did not pass to the Governor more people I thought would better understand the prosecutor's

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Representative Max Gruenberg
March 6, 2014
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perspective, but over time I have come to appreciate the wisdom of the Council's approach of sending the names of the most qualified applicants to the Governor. The proof is in the pudding: we in Alaska have an excellent judiciary. We should not change the way we have achieved that goal by short term political thinking.

Sincerely,



Robert C. Bundy

RCB:anu

Ernest Prax

From: Rep. Wes Keller
Sent: Wednesday, March 05, 2014 7:29 AM
To: Ernest Prax
Subject: FW: Testimony on HJR 33

From: Alison Arians [<mailto:alisonarians@gmail.com>]
Sent: Tuesday, March 04, 2014 11:39 AM
To: Rep. Wes Keller; Rep. Bob Lynn; Rep. Neal Foster; Rep. Gabrielle LeDoux; Rep. Charisse Millett; Rep. Lance Pruitt; Rep. Max Gruenberg
Subject: Testimony on HJR 33

Dear Members of the House Judiciary Committee,

Thank you for taking public testimony on HJR 33. I'm a small business owner in Anchorage. Just for the record, I'm not an attorney, and I'm testifying against HJR 33.

As a small business owner, I appreciate efficiency, a limited bureaucracy, and expert advice. I agree with the way our Judicial Council works now. Adding more people to the group will add significant expense to the travel budgets of this group, especially when they travel to places like Bethel.

I'm comfortable with asking people with law degrees to evaluate their peers. The combination seems efficient the way it is. I respect the Chief Justice's opinion, if necessary for him to vote, to know whether a judge is well qualified for a job. Also, I think the citizen members on the group deserve a little more credit for being able to make good recommendations to their group, and to back up their opinions. It's only been 15 times out of 1,100 votes when the Chief Justice sided with the attorney group against the public members. It seems to me that the group works very well, since 99% of the time, that's not happening!

For several years I volunteered as a Court-Appointed Special Advocate. I acted as a volunteer *guardian ad litem* for children. The only experience I have in front of a judge is acting as a *guardian ad litem*. When I vote, I want to be able to know that the judges I vote for are well-qualified, and I believe that the committee as it stands is effective and efficient at doing just that.

Alison Arians

Owner, Rise & Shine Bakery

Anchorage, AK

677-3712

748-3712

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

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

BACKGROUND – ROLE OF COURT

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

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

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

CONSTITUTIONAL BALANCE

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

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

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

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

COUNCIL VOTING DATA

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

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

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

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

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

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

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

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

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

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

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

PUBLIC INVOLVEMENT

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

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

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

RETENTION AND POTENTIAL FOR CONTROL

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

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

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

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

SUMMARY

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

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

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

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

From: David Nees <davidneesak@gmail.com>
Date: March 7, 2014 at 15:23:10 AKST
To: <Representative.Max.Gruenberg@akleg.gov>, <Representative.Charisse.Millett@akleg.gov>, Gabrielle LeDoux <Representative.Gabrielle.LeDoux@akleg.gov>, <Representative.Wes.Keller@akleg.gov>
Cc: Alaska Policy Forum <info@alaskapolicyforum.org>
Subject: Testimony HJR33

I was unable to testify today,
so here is my testimony.

Benjamin Franklin noted when you have lawyers nominate judges they tend to nominate successful high earning lawyers, this allows them to takeover the gap in the practice when they moved to Judge.

Judge McLaughlin at the convention noted the Missouri plan, so named for the 1940 change in Judicial council appointment, was adopted by many states, and although Liberal in nature it worked.

This is our system.

He also noted Hawaii chose not to adopt the Missouri plan, they instead opted to use a checks and balance system

2 selected by Bar,

2 selected by House,

2 selected by Senate,

2 selected by governor,

1 selected by Supreme court justice.

no more than 4 members can be bar members

I think this system would serve ALASKA well

David Nees
Non-Lawyer
2542 Curlew Circle
Anchorage Ak99502

My name is Mike Coons from Palmer and speaking for myself.

I fully support HJR 33 and HB 200.

As a voter, there is so little solid information on Judges. Over the years, the information from the Judicial Counsel has been lean and not helpful in helping me to make an informed decision on voting.

This amendment puts more citizen's than lawyers in the counsel which hopefully will add a better level of evaluation and scrutiny of the Judges, their history of decisions, how they sentence criminals, either lightly or heavily, etc. Criminal behavior and the resulting punishment, must be a deterrent vs the views of many on the left that prison is a place to learn to behave in civil society. I will vote, if I know any Judge who is lenient, the problem is the Counsel is mute on this issue.

Lastly I want to know if a Judge is following the Alaska Constitution and the US Constitution or is legislating from the bench. Those who legislate must be voted out. I do hope that my fellow citizens on the Counsel will let us the voters know whom these judges are.

I'm not asking for a "Hanging Judge" evaluation of the Judges, but I do want some clear history of what these judges are doing and frankly I do not believe a counsel like we have now is doing that with the lawyers making those determinations vs citizens.

Lastly, we must have a counsel that will follow the law itself and not endorse Judges. All I want is the information and I'll decide if Yes or No. Just for clarification, just about all my votes for all Judges because of poor information have been No.

Mike Coons
Palmer AK
745-6779

Testimony Re: HJR 33
House Judiciary Committee
Michael Pauley, Alaska Family Action
March 7, 2014

Thank you, Mr. Chairman, members of the committee, I'm Michael Pauley. I'm representing Alaska Family Action, which is the legislative advocacy arm of the Alaska Family Council.

Our organization supports more public involvement in the process by which we select, evaluate, and retain judges in Alaska. We support the goal of House Joint Resolution 33, which would increase the public's decision-making authority in that process.

No person can serve as a judge or justice in Alaska without first being nominated by the Judicial Council. This concentrates an awesome amount of power in the seven members who serve on this panel. In fact, they have more power than any other single entity to determine who will hold the reins of power in one of our three branches of government.

If we look at other states, there's a wide diversity in the number of people who serve on judicial nominating commissions:

Colorado:	16
Arizona:	16
Florida:	9
Utah:	8
Iowa:	15
Oklahoma:	15
Tennessee:	17

So, the proposal in HJR 33 for a 10-member Judicial Council is hardly radical or untried, and it's certainly mainstream as compared to other states. It's also important to note that the population of Alaska has at least tripled since the time of statehood, and the court system has grown along with it. Creating a larger Judicial Council seems appropriate as well, given its expanded workload and responsibilities.

But beyond the issue of the total membership on the Council, there's also a very crucial issue concerning what the proper balance should be on the Council between members who are there representing the interests of the state Bar Association vs. those members who are representing the general public.

Those who defend the Judicial Council's existing structure argue that it's perfectly balanced by having 3 attorneys and 3 public members. We strongly disagree with that view.

The attorneys on the Council are selected by the Board of Governors of the Bar Association – an entity with 4,212 members. They get to choose half the regular voting members of the Council, and they constitute ½ of 1 percent of the population of this state. The three public members are

there to represent non-attorneys – the other 731,000 Alaskans who are served by the Court system. Whatever one might call this system, it's not balanced. It shifts enormous power away from the general public and concentrates it in the hands of those who make a living practicing law in front of judges.

It's also important to remember that the Chief Justice is a dues-paying member of the Bar Association, and so in reality the Bar members have a majority of four of the seven seats on the Council.

Now some former attorney members of the Council have stated that they feel like they were representing all Alaskans, not just the Alaska Bar Association. That is an admirable sentiment -- but the fact of the matter is that the Board of Governors of the Alaska Bar Association has exclusive control to determine which members of the Bar serve on the Council. This cannot be emphasized enough: The Bar members of the Council are NOT appointed by the Governor, and they are not required to be confirmed by the Legislature. In contrast, the non-attorney public members must appear before the House and Senate Judiciary committees, where they can be questioned and grilled about their backgrounds, their political beliefs, anything. But meanwhile, the Bar members – most of whom are skilled trial lawyers – get a free ride, and don't have to go through this occasionally tough process.

This is different from how we structure other commissions in government. We of course recognize that we should have physicians on the state Medical Board. But we don't let the Alaska State Medical Association appoint them! The Governor appoints the physician members AND the public members, and they both have to stand for legislative confirmation – doctors and lay people alike, they all get treated equally. The same holds true for the Board of Nursing and the Board of Pharmacy.

One reason we support adding more public members is that it will provide a valuable check on the ability of Bar Association members to vote as a bloc to prevent clearly qualified judicial applicants from being nominated for the Governor's consideration.

There have been five notable examples in just the last two years where all three public members of the Council voted YES to nominate a particular applicant for a judicial vacancy, but all the participating attorney members voted NO. In each of these cases, the Supreme Court Justice sided with the attorneys and voted NO – thus acting to defeat the nomination and shorten the list of nominees that would be sent to the Governor.

What is stunning is that three out of these five votes occurred with respect to vacancies on the Supreme Court. And so we have this unseemly situation where the Chief Justice's NO vote is directly influencing who will be chosen to sit with him or her on the High Court. The potential of the Chief Justice in these situations to alter the future philosophical direction of the Court is undeniable.

I'd like to discuss just one example of these split votes between public members and attorney members, because I think it speaks volumes about what is broken in our current system.

In June of 2012, the Council met to consider the vacancy created when Justice Morgan Christen left the high court. The Council had to vote on a very distinguished group of 12 applicants. The pool of talent included: one judge from the Alaska Court of Appeals; three judges from the Superior Court, one each from Fairbanks, Palmer, and Anchorage; and two administrative law judges, one from Anchorage and one from Juneau. Incredibly, not a single one of the candidates with prior judicial experience was nominated for the Governor's consideration.

Instead, out of this distinguished field of applicants, the Council chose to nominate just two individuals. One was an attorney in private practice who also happened to be a member of the Board of Governors of the Alaska Bar Association – the same group, of course, that selects the attorney members of the Council. The other nominee was the former director of the Alaska Legal Services Corporation.

On June 26, 2012, the *Alaska Dispatch* ran a story about these two applicants that the Council nominated to the Supreme Court.

The reporter, Amanda Coyne, decided to look at the political views of the two nominees. Among other interesting details, she reported that one of the nominees, Mr. Peter Maassen, was a registered Democrat and a contributor to numerous liberal candidates and causes. She also reported that the other nominee, Mr. Andrew Harrington, was registered as non-partisan, but was formerly a member of the ACLU.

Now, as a member of the public, upon reading this, you might naturally conclude that out of a field of 12 applicants, the Council had chosen to nominate two attorneys with left-of-center political views to the Supreme Court. Is this a problem? As a representative of a conservative political organization in Alaska, my answer may surprise you: No, it's not a problem that the Council chose to nominate these gentlemen.

Very few would doubt that both of these gentlemen possessed the qualifications to serve on the Alaska Supreme Court – but surely not to the exclusion of the many other qualified applicants with distinguished careers and prior judicial experience. The scandal here is not about who WAS nominated, it's about who WASN'T nominated. It's not the Judicial Council's job to nominate only liberals or only conservatives, it's the Governor's job – as an elected official – to weigh those subjective factors in a nominee.

Now, some of the more strident critics of HJR 33 have made the rather unflattering charge that the goal of this amendment is to allow the Governor to appoint political hacks to the Council, who will nominate only applicants to his liking, so the Governor can stack the courts as he or she wishes.

My argument would be: if you want to look at how future Gubernatorial appointees might vote, your best yardstick is to look at how the past ones have voted. Let's look at the June 2012 vacancy on the Supreme Court as an example. At that time, on the Council, there were two public members on the Council appointed by Governor Palin, and one appointed by Governor Parnell. So how did these three Republican appointees vote on the two rather liberal nominees to the Supreme Court? Well, the answer is, that in the case of Mr. Maassen, all three Republican

appointees to the Council voted YES to forward his name to the Governor. In the case of Mr. Harrington, two out of the three Republican appointees voted to forward his name to the Governor. So the evidence shows that the public members were being inclusive in who they chose to nominate.

But in stark contrast to this, there were three different cases in 2012 alone, where the public members voted unanimously to nominate certain applicants to the Supreme Court, while the attorney members, including the Chief Justice, voted as a bloc to prevent these applicants from being considered by the Governor. In all three of these cases, the dispute did not concern an applicant who was some “crazy right-wing activist,” instead the applicants were sitting Superior Court judges who had already gone through previous vetting, and approval, by the Judicial Council. These were currently serving judges who were passed over, not crazy activists or sub-standard attorneys.

So in conclusion, I think it is grossly unfair to suggest that all public members, nominated by the Governor, and confirmed by the Legislature, would be political hacks who would threaten the impartiality of our Court system.

Now, the Judicial Council will tell you that the scenario I’ve described in my remarks about split votes between attorney members and public members is exceptionally rare. And that’s true when you factor in the hundreds of votes over the years on District and Superior Court vacancies, which make up the bulk of the Council’s work. But when you apply it to just the State Supreme Court, it’s not all that rare – especially in just the last two years.

As we sit here today, two out of the five seats on Alaska’s Supreme Court were filled by a process where the attorney members and the Chief Justice voted as a bloc to overrule the unanimous choice of the public members, and narrow the Governor’s options for filling these vacancies. And the public has no clue why this is the case, because of course all the deliberations occur in secret, behind closed doors.

One of the reasons that HJR 33 represents good public policy is that it will make such tie votes even more rare, if not impossible. A larger commission with an odd number of regular voting members is much less likely, statistically speaking, to experience tie votes, unlike our current system where six persons are regular voting members.

The method of selecting judges in Alaska is the least democratic and least transparent of all the various processes and mechanisms that help determine the composition of the three different branches of state government. The addition of three more public members to the Council will not, in and of itself, cure all the shortcomings of this process. But it will be a step in the right direction, adding more voices and more votes from ordinary citizens who are not influenced by the insider politics of the Bar Association.

The most important words in the Alaska Constitution are found in Article I, Section 2, which is titled: “Source of Government.” It states –

“All political power is inherent in the people. All government originates with the people, is founded upon their will only, and is instituted solely for the good of the people as a whole.”

We believe that HJR 33 is a proposal that is consistent with this constitutional heritage, and we urge your support of this measure.

Thank you very much.

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Kathleen Tompkins-Miller
POB 83440
Fairbanks, AK 99708

February 20, 2014

Members of the State Legislature:

I am currently the longest serving public member of the Judicial Council for the State of Alaska. I am supportive of a constitutional amendment that would provide the governor with more qualified candidates from whom he can appointment judges. But I do have some concerns about adding too many members to the AJC.

As you know, the AJC is composed of three public members, three attorney members, and the Chief Justice of the Supreme Court. The Chief Justice casts a vote whenever there is a tie vote of the six attorney and public members.

It is routinely claimed, in defense of Chief Justice's and lawyers' roles on the AJC, that the Alaskan judicial system is free of political influence. That has not always been my experience. From the selection of specific judges – sometimes retired – to preside over politically-tinged cases to the judiciary's approach to election-related cases, the politicization of members of the judiciary is transparent. When the Chief Justice sides against the public members on the AJC in limiting the number of candidates for the Supreme Court or other judicial positions, a question of political bias naturally arises.

Additionally, the members of the Alaska bar have tremendous influence over the process. Starting with anonymous bar surveys, in which attorneys routinely disparage potential candidates who may have more traditional views, or toward whom they may otherwise have a personal vendetta, the process is simply slanted. It is shocking to see (sometimes) anonymous, degrading comments and scores come from members of a profession purportedly trained in the "rule of law."

This process also keeps many good attorneys from applying or they withdraw their name because of the poll being made available to the public. The fear of damaged reputations, and perhaps the loss of future income, is simply not worth it to some. Many with low bar scores likely feel they won't have the ability to get through the council. It can also be difficult to get a candidate through the process who would be considered by some to be "conservative" in their judicial philosophy.

Further, there have been occasions where candidates have been criticized for activities or ideas on one side of the philosophical divide, while members on the other side are routinely promoted. Regrettably, a candidate who has been actively involved in traditional "conservative" causes is likely to have what appears to be a more vigorous background investigation, disparaging comments, and poor bar scores.

While I love my service on the AJC and I have always tried to be as fair as possible in my duties, it has saddened me that the AJC has rejected some judicial candidates even though public members have unanimously voted to advance them to the Governor.

It is my position that the Governor should not be prevented from considering certain qualified candidates. Although there is also risk of political bias from members of the public, I'd feel much more secure with a council whose ultimate decision is within the sound discretion of the public.

Sincerely,

A handwritten signature in black ink, appearing to read "Kathleen Tompkins-Miller". The signature is fluid and cursive, with a long horizontal stroke at the end.

Kathleen Tompkins-Miller



**Alaska Federation of Natives
2014 Legislative & Litigation Committee
Resolution 14-1**

- TITLE:** Opposition to SJR 21: Constitutional Amendment to Judicial Council Membership
- WHEREAS:** The Alaska Federation of Natives (AFN) is the largest statewide Native organization in Alaska and its membership includes 151 federally-recognized tribes, 134 village corporations, 12 regional corporations, and 12 regional nonprofit and tribal consortiums that contract and compact to run federal and state programs; and
- WHEREAS:** The mission of AFN is to enhance and promote the cultural, economic, and political voice of the entire Alaska Native community; and
- WHEREAS:** The Alaska Judicial Council (Council) is an independent citizens' commission created by the Alaska Constitution to screen applicants for judicial vacancies, nominate the most qualified applicants for appointment to the bench by the governor, evaluate the performance of sitting judges, recommend to voters whether certain judges should be retained for another term, and conduct research to improve the administration of justice in Alaska; and
- WHEREAS:** The Alaska Constitution provides that the Council shall have seven members, including three attorneys appointed by the Alaska Bar Association, three non-attorneys appointed by the governor and confirmed by the legislature, and the chief justice of the supreme court, who serves as the Council's chairperson; and
- WHEREAS:** Alaska's Constitution is widely acknowledged as one of the best state constitutions; and, thus, there should be clearly demonstrated reasons to amend the Constitution before undertaking such a process; and
- WHEREAS:** There is no evidence to suggest that the Council has failed to function effectively or efficiently in performing its duties — in fact, Alaska's judiciary has been free of corruption, scandal, and other ills that have plagued other non-merit based systems; and
- WHEREAS:** SJR 21: Constitutional Amendment to the Judicial Council (SJR 21), seeks to triple the Council's membership to five attorneys, ten non-attorneys, and Alaska's Chief Justice, in an effort to purportedly increase regional representation, and guard against attorney dominance; and

WHEREAS: Nothing in SJR 21 addresses regional representation, let alone Alaska Native representation on the Council, and no evidence exists to support the proposition that attorneys out-will non-attorneys in the selection of Alaska judges; and

WHEREAS: SJR 21 would create numerous problems for the Council, including, without limitation, a politicized non-attorney membership that is philosophically and politically aligned with the governor — which will, in turn, tilt the balance in favor of the non-attorneys appointed by the governor, and likely result in the more conservative judges on Alaska's bench; and

WHEREAS: Historically, conservative judges have been less sympathetic to Alaska Native Tribes, tribal organizations, and individual Alaska Natives subjected to Alaska's criminal or civil judicial system; and

NOW THEREFORE BE IT RESOLVED by the Board of Directors of the Alaska Federation of Natives, Inc. that SJR 21 conflicts with our mission to enhance and promote the cultural, economic, and political voice of the entire Alaska Native community; and

BE IT FURTHER RESOLVED that Alaska Federation of Natives strongly opposes SJR 21.



Julie Kitka
President