

HJR33

March 20, 2014

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Thank you for the opportunity to testify today on HJR33. Because we were pressed for time, I omitted a few points that I had wished to discuss. I hope you will accept this additional information.

As I mentioned, the Alaska Judicial Council has not taken a position on this legislation. The purpose of this letter is not to support or oppose HJR but rather to provide information that the Committee may find useful in its work.

Background

The Alaska Judicial Council has constitutional and statutory duties in three main areas:

1. **Screening applicants for judgeships** based on their qualifications, and sending at least two names to the governor for appointment;
2. **Evaluating the performance of sitting judges**, and providing information about judges' performance directly to the voters;
3. **Conducting studies to improve the administration of justice** (past work includes criminal sentencing, recidivism, and outcomes in felony case processing; alternative dispute resolution, civil jury verdicts, child protection litigation, and domestic violence protective orders.)

The Council Strives to be Open in its Judicial Selection Procedures

The Council involves the public at every step of its process in order to understand what the people of a particular area think about the applicants and what qualities they want in their judge. The Council travels in person to every town where a judgeship is open, and has a public hearing there to listen to what people of the area have to say. The Council makes liberal use of press releases to keep folks aware of who has applied and when the meeting is scheduled. In the smaller communities, Council staff try to get on the radio or give talks to local groups who are interested in the process. People who'd rather not come to a public hearing can submit letters or other written comments to the council.

As much as possible, the Council shares information publicly. This includes releasing the Bar survey scores and voting in public on each applicant.

An attachment to this letter further describes the Council's judicial selection procedures.

Council Members' Votes Show a Striking Amount of Agreement

Because their focus is on qualifications, Council members are usually of one mind about which candidates to send to the governor. In fact, 72% of the time the Council members agree, and another 19% of the time all but one agree. So about 82% of the time there is full or almost full agreement among the Council members on which names to forward to the governor.

There have been times when Council members have not agreed, and the Chief Justice has been required to vote. Those situations have occurred in about 6% of all votes cast over the last 30 years. There has never been a time when the Council was split 3 – 3 but the Chief Justice had a conflict of interest that prevented him or her from voting.

Over the last two years, the Chief Justice has voted with about the same frequency (actually, a little less frequently) than the historical average of 6%. Specifically, since the beginning of 2012, the Council has voted on 142 candidates for 15 vacancies. Of those votes, the Chief Justice voted 6 times, which is only about 4.2% of all votes - less than the historical average of 6% of all votes. Looking back over the last 5 years, we see that the Chief Justice voted 12/271 votes, for an average of 4.4% of all votes, still under the historical average.

The chart attached to this letter has more information about the Council's selection votes.

Constitutional Convention

The delegates to Alaska's Constitutional Convention debated vigorously and thoroughly whether and how to adopt a merit selection plan for Alaska's judges. Many of the issues being discussed today were discussed and decided by the delegates 50 years ago. For

example, on the issue of legislative confirmation of attorney members, the chair of the Judiciary Committee explained:

If you require 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 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 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.

You heard testimony today that a consultant hired to assist the delegates was concerned that the merit selection plan approved by the delegates gave too much influence to the organized bar. It is true that the consultant expressed that concern and recommend revisions. The recommended revisions were presented to all the committee chairmen (not just the Judiciary chair), and the chairmen did not accept them. In fact, consultants made recommendations for a number of substantive changes, only one of which was adopted. "The other major proposals had been discussed in one form or another in committee or in plenary discussions, and the chairmen understandably resisted the idea of reopening controversial issues during the last days of the convention." Source: V. Fisher, Alaska's Constitutional Convention, at page 42.

Most other states' panels are balanced

Of the 38 states that use judicial nominating commissions, 18 have an equal number of attorney and non-attorney members as Alaska does.

A few states (five) have more non-attorney members, but four of those states have restrictions that require balanced political party representation (in order to prevent an appointing authority from “stacking” the membership.) In Arizona, which has been mentioned as a possible model for this legislation, the law specifically prohibits more than three of the five attorneys and 5 of the 10 nonattorney members from being of the same political party.

A few other states (five) have more attorney than non-attorney members, but again, two of the five also have the restrictions to preserve balanced political party representation.¹

Source: American Judicature Society: www.judicialselection.us.

¹ The remainder to do not designate their membership.

Alaska Judicial Council Judicial Selection Procedures

All vacancies are publicly announced via web site and press release. The Council releases the names and biographical information about all applicants for judicial vacancies (other states' judicial nominating commissions do not release applicants' names).

For each applicant, the Council solicits information about the applicant from:

- every past employer (legal and nonlegal);
- lawyers and judges who have been involved in recent litigation with the applicant;
- professional references who speak to the applicant's legal skills, integrity, fairness and temperament;
- character references who speak to the applicant's integrity, fairness, and temperament;
- members of the public.

In addition, the Council investigates each applicant's:

- educational achievements (legal and nonlegal),
- publications,
- community service,
- bar service,
- trial experience and criminal or civil practice experience,
- grievances filed and any resulting discipline,
- criminal history and any tickets,
- civil lawsuits, and
- credit reports.

The Council sends out a survey to active members of the Alaska Bar Association. Bar members are asked to rate applicant on legal ability, temperament, integrity, fairness, and suitability of experience. The results of that survey are made public.

On the survey, Bar members are invited to submit written comments about the applicants. The comments can be signed or anonymous. However, anonymous comments are not considered by the Council members unless they are corroborated, independently substantiated, or acknowledged by the applicant. The Council shares each applicant's comments with the applicant after they have been edited to preserve the anonymity of the commenter.

After providing all this information to the Council members, the members interview each applicant. Each interview lasts at least 45 minutes. The interviews are held at the location of the vacancy so that the Council can have a public hearing at which it invites people to comment on the applicants or any other aspect of the process. This interview can be public or private, depending on the candidate's wishes. Each interview is scheduled for 45 minutes to an hour. The chair goes around the table so that each Council member has the chance to ask questions that are important to him or her.

After the interviews, the Council members deliberate. During deliberation, each member is called on to state his or her views. The focus is on the relative merits of each candidate compared to the other candidates. The Council members vote in public (about half of nominating commissions in other states do not take public votes).

Alaska Judicial Council
Historical Voting Information
March 20, 2014

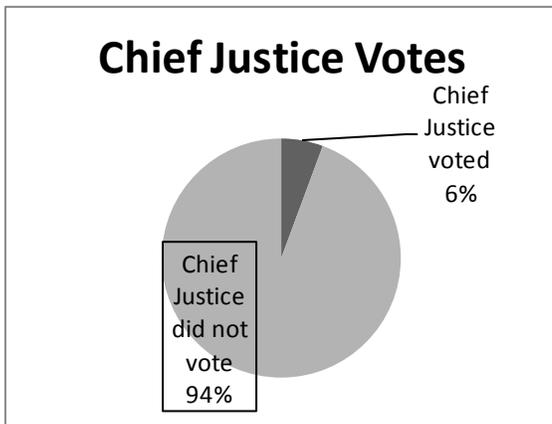
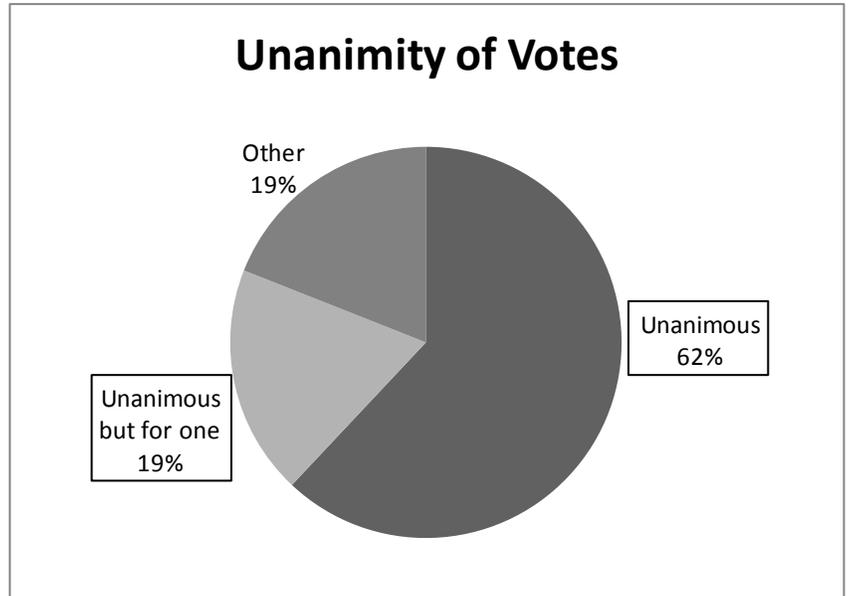
The Council members voted on **1,136 applications** between January 1, 1984 and December 31, 2013. This fact sheet shows some of the ways those votes were taken.

- **Council members have a high rate of agreement about nomination decisions**

Historically, most Council votes have been unanimous (62%).

In an additional 19% of all votes, only one person voted differently from the others.

Thus, in 81% of the votes, Council members have been unanimous or nearly so in their assessment of whether an applicant's name should be forwarded to the governor.



- **The Chief Justice rarely votes**

The Chief Justice votes only when to do so would change the outcome. Over the past 30 years, chief justices have voted only 68 times. Thus, 94% of the time, the chief justice does not vote. In the last two years,

- **Attorney/nonattorney vote splits are rare**

Only 15 times in the last 30 years have disagreements about nomination decisions broken along attorney-nonattorney lines. This situation occurred in less than 2% of all votes.

- **When called upon to vote, the chief justices usually forward the name in question to the governor.**

75% of the time, chief justices voted “yes” to forward the name in question to the governor.

- **The Council usually forwards more than two names to the governor**

In about seventy-three percent (73%) of all judicial selections, the Council members forward more than two names to the governor. Instances in which the Council sends fewer names often occur on vacancies in small rural areas.