

MINUTES
SENATE FINANCE COMMITTEE
April 12, 2001
9:13 AM

TAPES

SFC-01 # 73, Side A
SFC 01 # 73, Side B
SFC 01 # 74, Side A

CALL TO ORDER

Co-Chair Pete Kelly convened the meeting at approximately 9:13 AM.

PRESENT

Senator Pete Kelly, Co-Chair
Senator Dave Donley, Co-Chair
Senator Jerry Ward, Vice Chair
Senator Loren Leman
Senator Gary Wilken
Senator Alan Austerman
Senator Donald Olson
Senator Lyda Green

Also Attending: SENATOR DRUE PEARCE, Alaska State Legislature;
JUDGE RABINOWITZ

Attending via Teleconference: From Anchorage: STEPHANIE COLE,
Alaska Court System; WILLIAM COTTON, Alaska Judicial Council;

SUMMARY INFORMATION

SB 123 - FEDERALLY FUNDED PROJECTS OF RAILROAD

After a brief discussion and testimony from the Alaska Railroad Corporation the bill was reported from Committee.

SJR 22 - CONST. AM: JUDICIAL OFFICERS' TERMS

The Committee heard testimony from the Alaska Court System and the Alaska Judicial Council and the bill was held in Committee.

HB 72 - ASST.ADJUTANT GEN.: MISSILE/SPACE DEFENSE

After brief debate the bill was reported from Committee.

#sb123

CS FOR SENATE BILL NO. 123(TRA)

"An Act relating to legislative approval for the design and construction of facilities of the Alaska Railroad Corporation and railroad line realignment and railroad corridor projects of the Alaska Railroad Corporation."

SENATOR DRUE PEARCE, sponsor of SB 123, indicated that they had a work draft before them.

Senator Leman moved to adopt the committee substitute (CS) for SB 123, 22-LS0522\P, Utermohle, 04/10/01, as a work draft.

Co-Chair Kelly asked if there were any objections.

There were no objections and Version P was adopted.

Senator Pearce indicated that Version P changed dramatically the direction that she was going in terms of approval of projects on the facilities that the railroad would be building. She explained that the CS would require the railroad corporation to obtain legislative approval for the program of projects, which were the lists of federally funded projects required by the federal transit administration and the federal highway administration. The CS represented the collaborative effort between herself and the railroad, which would require approval for major construction projects while excluding regular maintenance projects, minor construction and realignment project and projects outside of communities that were entirely on federal lands. She pointed out that the bill required the railroad board of directors to present their program to the legislature on the first day of each regular session; that program would be referred formerly to the House and Senate Finance Committees for review. She indicated that the legislature would be able to disapprove, by law, the expenditure of federal funds for a project during the first 60 days of session. She noted that failure of the legislature to disapprove would be recognized as approval for the expenditure of funds. She commented that the process was very much like that of the Local Boundary Commission.

Senator Pearce further stated that the bill was introduced in response to the Alaska Railroad Corporation's multi-million dollar rail station project at the Ted Stevens International Airport in Anchorage. She pointed out that the railroad received direct federal appropriations for that project. She indicated that there

was no input or coordination with the legislature prior to the project and, more importantly, there was no public review process in Alaska at any level before the project was begun. She noted that the project would impact a large number of Anchorage residents. She said that there were also concerns with the feasibility and economic practicality of the project; the original appropriation for the terminal was \$28 million and the realignment project was expected to cost \$18 million. She pointed out that the market analysis did not support spending \$46 million on the project. She believed, in response to the concerns with the Anchorage rail station, that they should require the railroad to obtain legislative approval for future projects.

[Note: Microphones inoperable for Co-Chair Kelly, Senator Leman, Co-Chair Donley, Senator Green and Senator Austerman]

Co-Chair Kelly referred to the CS with a question [exact statement inaudible].

Senator Pearce pointed out that on page 2 of the CS there were exceptions that did not apply to the subsection; those being that the facility construction cost be less than \$5 million and the track realignment construction cost be less than \$10 million. Therefore, there were exemptions for the smaller projects.

Senator Olson understood where the concerns were toward the current projects, but if they looked at the long-term effects of the increased traffic through the Anchorage international airport how were they going to accommodate for the increase in the amount of people traveling nowadays without a rail facility.

Senator Pearce pointed out that the Anchorage airport terminal project was going to go forward. She noted that Europe did have a much better rail system. Unfortunately, in Anchorage they would be held back because the track would only go north and south. She maintained that in the United States while the market analysis spoke about cities where there was a lot of commuter traffic to and from airports every city where it had been successful was a city with millions of people. She noted that a city the size of Anchorage would not have the population to support constant commuter service.

Senator Wilken wondered what Senator Pearce's intent was if the project construction costs were larger than \$10 million and the legislature were to disprove it.

Senator Pearce indicated that the railroad would have to readdress the project and the concerns. She did not believe that the

legislature would turn down a project unless there was an outcry by the people in the locality of where the project would take place. She stressed that it would be very difficult to ask the legislature to act within 60 days and reminded the Committee that the Governor could always veto the bill. Therefore, they would have to have two-thirds of the legislature fighting against a project before one would actually be turned down. She believed that it was important for the railroad to be required to come before an elected body, like the legislature, for the purpose of bringing the people into the process and assist the railroad in being more cognizant of the issues.

Senator Wilken voiced his appreciation for the changes that were made. He wondered if on the 58th day the legislature were to turn down a major project whether the railroad would have to wait until the next session to move forward on the project.

Senator Pearce replied, "Yes. For construction."

Senator Wilken clarified that they would not have another look at it until the next session.

Senator Pearce explained that the legislature would authorize the use of federal funds exactly like they did with the Department of Transportation and Public Facilities on building roads. She predicated that the minute the railroad saw enough concern with a project they would be working with the legislature.

Co-Chair Kelly [indiscernible].

Senator Pearce agreed with Senator Kelly. She added that in seeing the ideas of the railroad for the future and their opportunity to receive money from the federal government it would not surprise her to see the railroad come to the legislature for help with matching funds, because most of the federal programs do require matching funds. She pointed out that the railroad had matched dollars over the years, but if they were handed \$100 million for a huge realignment she did not see how they would come up with a 20 percent match. She believed that the legislature would become more active in railroad expansion.

Senator Green wondered if the language on page 2, line 4 would apply to the Mat-Su Borough.

Senator Pearce understood that boroughs count as communities. She clarified that if they allocated state funds for a federal match than that would be considered approval.

Senator Green indicated that she was not sure what the language stated exactly, but that the money was appropriated as leverage for federal money. She wondered if they would have to wait an entire session for that approval.

Senator Pearce referred to page one of the bill on the bottom of the page and indicated that if a project were substantially changed then the railroad would have to come back to the legislature for approval.

Senator Green requested clarification that the project would not have been approved. She pointed out that there were miles of railroad to interconnect and wondered if those projects would fall under the requirement for additional legislative approval.

Senator Pearce answered probably, because in order to get on the federal list for projects they would have to come back to the legislature. She assumed that the project would have to go through the process at the federal level already. She further clarified that if a project wanted to receive federal funds then it would have to appear on the program at some point and the first time it appeared there with construction money would be the year for legislative approval.

Senator Leman seemed to him that if the legislature were to disapprove, by law, then the legislature could also approve, by law, if there were a change in the project sometime after the disapproval. He clarified that it could be during the rest of the regular session or even during a special session rather than on the first day of the next session and the legislature would not be in violation.

Senator Pearce agreed, but believed that it could not be through the capital budget process, rather there would have to be an actual law passed.

Senator Leman agreed.

Senator Pearce reiterated that they could not get to it through the Legislative Budget and Audit process.

Senator Leman interpreted it the same way.

Senator Pearce noted that when they ran into problems at the legislative level there would be enough scurrying about that some accommodation would be found before the end of session.

Senator Leman agreed. He questioned whether the definition of

"substantial" with regards to the pipeline ride-of-way would concern them or the railroad.

Senator Pearce stated that she was comfortable with the definition of "substantial" provided by Mr. Utermohle. She explained that if the railroad had funds to build to Point Mackenzie and they decided to build to Skwentna instead that would be considered a "substantial" change. On the other hand, she noted that if the railroad had to change a route a little bit to accommodate a wolf den then that would not be considered a "substantial" change. She reminded the Committee that in federal law if those projects change then there would need to be a reauthorization process.

Senator Lemman clarified that in federal regulation there would probably be a definition of "substantial."

Senator Pearce said that she was not sure if it was defined or not in the federal regulations. She did not expect the railroad to go outside of what they intended. She noted that the railroad did have a lot of land and it was hard to say what they might come up with in terms of development.

Senator Ward commented that the Alaska railroad was an interesting entity. He wondered why they would pass this legislation rather than putting the railroad under the executive budget act.

Senator Pearce parlayed that this would be a "slap on the hand" whereas that would be a "sledgehammer."

Senator Ward questioned the specifics of it and wondered if this legislation would impede the railroad's ability to do what they felt was best.

Senator Pearce answered that sure it would impede their ability to some extent, but not much. She believed that it was something that the railroad should do and she worked with the railroad to come up with something that they were willing to do. She pointed out that the railroad was an asset of the state and all Alaskans were shareholders of the railroad. She indicated that if they want the railroad to be able to act like a business than putting them under the executive budget act would not be the way to go. She said that she did not feel that the government acted well as a business.

JOHN BINKLEY, Chairman of the Board, Alaska Railroad Corporation, testified via teleconference from Fairbanks, thanked Senator Pearce for the CS, Version P, and indicated that it was a tremendous improvement to the CS that came out of the Senate Transportation Committee. He pointed out that it was an effort on Senator

Pearce's part out of frustration that she had felt with the construction of the project at the Ted Stevens International Airport in Anchorage. He gave some background from the railroad's point of view on that project. He explained that the Department of Transportation and Public Facilities approached them when the department began the reconstruction of the terminal at the airport. The airport had dictated that if the railroad wanted to maintain their existing line than they had to be apart of the project. He said that the intent of the railroad was to preserve that corridor. He urged that they tried to communicate with the legislature on their projects and never did get a huge reaction or negative reaction. He noted that they did as much as they could to inform the public about the project. He referred to the additional cost of the rails going into the airport and noted that it was being looked at for future projects if there was a tremendous amount of use of those rails. He thought that if they got to the point to spend additional money to realign the rail it would be a tremendous success. He said that they hoped there would be acceptance of commuter rail in the Anchorage area and that they would increase the number of trains going in and out of the airport. He commented that he would see that as a success if it indeed were to happen.

Mr. Binkley continued that two of the key pieces in the legislation were that it forced a close working relationship between the railroad and the Department of Transportation and Public Facilities and secondly, that the railroad would have autonomy. He noted that the number one consideration was safety and number two was the customer. He expressed that where there was concern with the original CS from the Senate Transportation Committee with regards to it crossing the line with regards to the legislature becoming an integral part of the decisions of the railroad. He again thanked Senator Pearce for her work on the legislation.

Senator Leman moved to report CS SB 123, 22-LS0522\P, Utermohle, 4/10/01, from the Committee.

There was no objection and the bill was reported from Committee.

AT EASE 9:49 AM/9:51 AM

#sjr22

CS FOR SENATE JOINT RESOLUTION NO. 22(JUD)

Proposing an amendment to the Constitution of the State of Alaska relating to the retention elections for justices of the Alaska Supreme Court and judges of the superior court.

STEPHANIE COLE, Administrative Director, Alaska Court System, testified via teleconference from Anchorage, indicated that the Alaska Court System concurred with the position taken by the judicial council. She stated that the Alaska Court System believed that the proposed shortening of the periods between retention elections in the resolution would have a serious effect on the quality of justice in the State of Alaska. She explained that the merit selection and retention system currently in place in Alaska was cited quite often as a model system balancing judicial independence and judicial accountability. It was a system that preserved the judges ability to make decisions impartially and without undue political pressure against the public's rights to hold the judges accountable. She said that they really felt that judicial accountability was enormously important and was in no way inconsistent with judicial independence.

Ms. Cole further explained that the three aspects of judicial accountability were political accountability, decisional accountability and behavioral accountability. She noted that each of those aspects was important and each served a different purpose. She stated that political accountability was accomplished through the retention election process, which allowed the public to approve judges. Decisional accountability was related to the issue of whether a judge was correct or incorrect in a particular decision and it was accomplished through the appellate process as the case went up for appeal. Behavioral accountability would come into play when judicial misconduct was at issue and it was provided through the judicial discipline process. She warned that when they start proposing to shorten retention terms in the way that SJR 22 would do then they create a situation where they start blurring the lines between political accountability and decisional accountability to the detriment of the justice system. She pointed out that the current retention terms were in the mainstream of retention terms around the country.

Ms. Cole further stated that while their role as legislators was in large part to reflect the will of the majority and their constituents, the role of the judge was to protect the minority against which the will of the majority should never be able to prevail. She indicated that the judge must apply the law to a set of facts without regard to the political atmosphere or the will of the majority. She noted that this was very difficult and often an unpopular task, but it was enhanced by the current system that provided some protection against a judge being punished politically for a particular decision. She urged that when they start shortening the period between retention elections then it becomes more likely that political campaigns would be waged against

individual judges because of a single unpopular decision. She explained that as campaigns were mounted against judges then judges could and would respond with counter campaigns. She noted that it had become a serious public concern throughout the country, because it could compromise a judge's ability to rule neutrally and be perceived as neutral.

SFC 01 # 73, Side B 10:01 AM

Ms. Cole continued that judges needed to be evaluated at regular intervals about how they handled all their cases instead of how they handled one or two highly-visible cases. She stressed that the legal system commanded allegiance only when it commanded respect and it only commanded respect when the public believed that the judges were neutral. She expressed grave concern that by shortening the period between retention elections it would also discourage qualified applicants from seeking judicial positions. She noted that judicial salaries were currently dropping. She concluded that the Alaska Court System was opposed to SJR 22.

Senator Ward requested clarification that Ms. Cole had stated that the role of the state was to protect the minority and the role of the legislature was to protect the majority.

Ms. Cole clarified that, generally, the role of the legislature was to protect the rights of the constituents or the majority, whereas, the primary role of a judge was to protect the rights of the minority against which the will of the majority should never prevail. She further clarified that she had not intended to say that the legislature did not represent the minority, but rather that it was the role of the judge to protect the rights of the minority against infringements.

Senator Ward spoke to the sovereign rights of the individual regardless of whether they were in the minority or the majority.

Senator Lemman referred to Ms. Cole's comment about Alaska being a model of the system. He argued that it was not really a model that would get the most qualified judges.

WILLIAM COTTON, Alaska Judicial Council, testified via teleconference from Anchorage, responded to Senator Lemman's comments. He stressed that almost every decision made by the judicial council was unanimous. He stated that the council opposed SJR 22, because they believed it would be counterproductive to their goal of encouraging judicial excellence. He echoed some of

Ms. Cole's comments. He indicated that the council urged them to think long and hard before upsetting the system and vote against SJR 22.

Co-Chair Donley mentioned that 20 other states had merit selection retention laws similar to Alaska. He noted that three of those 20 states had the same retention terms proposed by SJR 22. He wondered if that was also Mr. Cotton's understanding. He pointed out that in Kansas each community could choose whether or not they wanted to conduct a direct election or use an appointment retention system. He said that it was a 50/50 split statewide. He also referred to Oklahoma and indicated that two of the 20 states that allegedly had the same system as Alaska, in fact, had a significant number of their judges elected.

AT EASE 10:19 AM/10:24 AM

Mr. Cotton explained that many of the states nationwide were very different from Alaska in that rather than having a statewide system they had municipal courts, county courts and state courts. He said that the courts in the United States had three basic systems: a merit selection system, similar to Alaska; appointed system, where the Governor appoints judges; and an elected system.

Co-Chair Donley pointed out that they did have a unified court system. He indicated that other states had the flexibility to select other systems. He noted that it was not accurate to say the other 20 states used a retention system. He wondered what the criteria were on the surveys.

Mr. Cotton indicated that they did report all the survey information. He noted that they also reported detailed demographic information. He said that they promised confidentiality in order to get accurate information.

Co-Chair Donley wondered if all the responses were included in the information given to the public.

Mr. Cotton replied that the information was disseminated in several different ways. He noted that everyone that responded got his or her numbers reported.

Co-Chair Donley wondered if the distinction between those with direct personal experience and those with just an opinion were carried over into the recommendation process.

Mr. Cotton explained that they did report the different levels of professional experience.

Judge Robinowitz, supreme justice, Court of Alaska, pointed out that what they were dealing with was one issue and that being a periodic evaluation of judges under a merit selection system. There use to be no accountability and they rejected that and wanted the judiciary to be accountable and then a judge would be elected on a partisan ballot and it was too compromising to the judges. He explained that they came up with a periodic retention and election system. He asked the Committee if it has worked. He assured the Committee that the judges were aware of the accountability that was built into Article 4 of the Constitution of the State of Alaska. He said that his impression was that the system was working. He urged that they not change it if it was working. He said that sure over 20 or 30 years they would get some bad opinions, but he noted that the thousands of opinions that stand up under scrutiny were a service to the system. He opined that if they truncate every term into a four to six year term they would dilute the voters analysis of a judges particular record. He pointed out that Alaska was able to get more information to the voter. He pleaded with the Committee that the issue was independence versus accountability and they were dealing with the Constitution of the State of Alaska. He stressed that they should not change something that was working.

Senator Donley wondered what the debate was in forming our government.

Judge Rabinowitz recollected that ten years and six years struck the appropriate balance on undue pressure on judges and the people's right to exercise a check and accountability on judges. These were the appropriate time frames. In 1955 this was an experiment and he noted that the Constitution was still an experiment. He pointed out that what they had to do in the court system was gradually come into maturation. He stated that the test of time has worked. He said that they needed to strike an appropriate balance between accountability and allowing the judges to perform their judicial functions.

Co-Chair Donley wondered what the difference was in how society and laws had evolved since the 1950s. He suggested that it would have been difficult for the people in the 1950s to have envisioned how the courts would have evolved.

Judge Rabinowitz commented that this was almost Political Science 101. He explained that they were a passive institution that did not initiate litigation. He said that they might go four or five years without seeing a case at the appellate level that had

statewide appeal. With regards to the question of whether the courts have become more radical he suggested that they take a look at Marbury (ph) vs. Madison. He explained that out of the three branches of government the judiciary was the one that was going to decide what was constitutional and would bind the three branches of government. He urged that this was going on from the inception of government and over time it had proven to work. He pointed out that they had to draft the Constitution in broad terms and they hit on a brilliant solution. He said that he did not feel it was a reflection of an activist court. He would not label his colleagues as activists.

Co-Chair Donley wondered what court changed the standards for public interest litigation and the professed intent of the court was to promote more cases coming to them and more involved in social issues.

Judge Rabinowitz advised that he had never seen any indication over the years that a justice had a political or philosophical agenda imposed on the court. Believe it or not they took the cases as they came and no one dominated the court. He reiterated that the system was working.

LES GARA, testified via teleconference from Anchorage, expressed that in 1955 the founding fathers and mothers worked to create as credible a judiciary as possible. He urged that they came up with for this nation a model as an impartial judiciary. He said that they came up with the best system yet. He noted that they considered what they did and they debated what they did and they decided that reducing the retention terms was a bad idea. He referred to the idea that the judges currently were more radical. He pointed out that in the 1950s there was the same cries that judges were radical.

SFC 01 # 74, Side A 10:55 AM

Mr. Gara noted that the work done in 1955 was good work and agreed with Judge Rabinowitz that there has been nothing to encourage changing it now. He urged the Committee to go back and read through the constitutional debates.

Co-Chair Kelly frustrated about some of the testimony that the deference to the constitutional delegates of 1955 that the same people say that the Constitution was a living document. Ignoring the fact that they put for us a method of changing the constitution. He pointed out that the delegates in 1955 probably

never imaged that the courts would be taking the kind of liberties that they are taking currently. Doubt that they ever imagined that the courts would be taking the kind of freedoms that they have been taking. The right of appropriation belongs to the legislature. Only convenient when it suits their purposes.

Bruce Weyrauch, President, Alaska Bar Association, believed that an independent form of judiciary is critical to the government. The more the political process moves the retention level down the less they could provide the clients in the private sector.

[Heard and Held]

AT EASE 10:58 AM/10:59 AM

#hb72

HOUSE BILL NO. 72 am

"An Act relating to an assistant adjutant general for space and missile defense in the Department of Military and Veterans' Affairs."

Co-Chair Kelly pointed out that it was a state position using federal funds.

CARROL CAROL, Department of Military and Veterans Affairs, explained that a position of this kind would give Alaska forefront in the decision making process and the ability to hire someone from Alaska. She agreed that it was completely federally funded.

Co-Chair Donley wondered if she had any objection to a 5-year sunset on the position.

Ms. Carol did not have an objection, but believed that five years would be an appropriate time.

Co-Chair Donley noted that five years was a reasonable amount of time.

Co-Chair Kelly asked Co-Chair Donley if he wanted to propose a conceptual amendment.

Co-Chair Donley moved a conceptual amendment to add a five-sunset provision to the position.

There was no objection and the conceptual amendment #1 was adopted.

Senator Wilken made a motion to report HB 72, 22-GH1055\A.a, as amended, from Committee.

Senator Olson wondered if the employee would fill a state position.

Ms. Carol responded correct.

Senator Olson wondered if there would be other state employees in addition.

Ms. Carol replied no.

Senator Leman wondered if there was any need to have a more immediate effective date.

Ms. Carol that would be a positive amendment.

Senator Wilken removed his motion to report bill from Committee.

Senator Leman moved a conceptual amendment for an immediate effective date.

Co-Chair Kelly asked if there was any objection.

There was no objection and conceptual amendment #2 was adopted.

Senator Wilken made a motion to report HB 72, 22-GH1055\A.a, as amended, from Committee with attached fiscal note.

There was no objection and the bill was reported from Committee.
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ADJOURNMENT

Co-Chair Pete Kelly adjourned the meeting at 11:08 AM.