ALASKA STATE LEGISLATURE
SENATE JUDICIARY COMMITTEE
April 2, 2001
1:41 p.m.

MEMBERS PRESENT

Senator Robin Taylor, Chair
Senator Dave Donley, Vice Chair
Senator Gene Therriault
Senator Johnny Ellis

MEMBERS ABSENT

Senator John Cowdery

COMMITTEE CALENDAR

SENATE CS FOR CS FOR SS FOR HOUSE BILL NO. 13(CRA)
"An Act relating to municipal service areas and providing for voter approval of the formation, alteration, or abolishment of certain service areas."
HEARD AND HELD

SENATE JOINT RESOLUTION NO. 22
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.
HEARD AND HELD

PREVIOUS COMMITTEE ACTION

HB 13 - See Community and Regional Affairs minutes dated 3/19/01.

WITNESS REGISTER

Representative Con Bunde
Alaska State Capitol
Juneau, Alaska 99801-1182
POSITION STATEMENT: Sponsor of HB 13

Mr. Jeffrey Bush, Deputy Commissioner
Department of Commerce & Economic Development
PO Box 110800
Juneau, Alaska 99811-0800
POSITION STATEMENT: Opposed all of HB 13 except Sec. 4

Ms. Jean Woods
Box 827
Palmer, Alaska 99645
POSITION STATEMENT: Supported HB 13

Mr. Joe Balash
Staff Aide to Senator Therriault
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Testified on HB 13

Ms. Stephanie Cole, Administrative Director
Alaska Court System
303 K Street
Anchorage, Alaska 99501-2084
POSITION STATEMENT: Opposed to SJR 22

Mr. William T. Cotton, Executive Director
Alaska Commission on Judicial Conduct
310 K Street, Suite 301
Anchorage, Alaska 99501
POSITION STATEMENT: Opposed to SJR 22

Mr. Bruce Weyhrauch
Law Offices of Bruce Weyhrauch
114 South Franklin Street, Suite 200
Juneau, Alaska 99801
POSITION STATEMENT: Opposed to SJR 22

Senior Justice Jay Rabinowitz
Alaska Court System
303 K Street
Juneau, Alaska 99501-2084
POSITION STATEMENT: Opposed to SJR 22

Mr. Les Gara
Attorney
1242 West 10th Avenue
Anchorage, Alaska 99501
POSITION STATEMENT: Opposed to SJR 22

ACTION NARRATIVE

TAPE 01-14, SIDE A
Number 001

CHAIRMAN ROBIN TAYLOR called the Senate Judiciary Committee meeting to order at 1:41 p.m. Senator Therriault, Senator Ellis, and

Chairman Taylor were present. Senator Donley arrived at 2:01 p.m. Chairman Taylor announced the first order of business would be HB 13.

#HB 13

HB 13-SERVICE AREAS: VOTER APPROVAL/TAX ZONES

REPRESENTATIVE CON BUNDE, sponsor of HB 13, said the bill was about smaller government, local control, and privatization. HB 13 allows people in limited service areas, where changes are needed, to have a vote on the changes. There are 200 service areas in Alaska with Fairbanks having more than 100. In order for the borough and Municipality of Anchorage to combine, people who had limited road service areas had to be assured a right to maintain those areas in order to convince them that consolidation was a good idea. HB 13 guarantees the status quo in areas where people are contemplating consolidations. HB 13 says that if there is to be a consolidation alteration there has to be a majority vote by both entities, the service area and the surrounding area. The bill allows for the consolidation of many service areas for administrative savings while maintaining a differential taxation rate. Improved subdivisions with a higher level of road service and areas with more traditional Alaskan roads with a lower level of road service can each maintain their own level of service. The bill last year only applied to areas with 60,000 people or more and HB 13 applies to everyone in Alaska.

CHAIRMAN TAYLOR asked how HB 13 would impact home rule cities.

REPRESENTATIVE BUNDE said there are currently 53 limitations in statute on home rule cities and HB 13 would add one more statute.

CHAIRMAN TAYLOR said he thought HB 13 would impact home rule cities, and that the primary thrust of HB 13 was to "go after" unified city/borough governments.

REPRESENTATIVE BUNDE said unified city/borough governments were the primary thrust of HB 13 but it also would have an impact on home rule cities.

CHAIRMAN TAYLOR asked what that impact would be.

REPRESENTATIVE BUNDE said there would be an impact if the cities had service areas.

CHAIRMAN TAYLOR asked how home rule cities with service areas would

be treated differently after the passage of HB 13.

REPRESENTATIVE BUNDE said an alteration or change in a service area would require a majority vote of the entire community before any change could take place.

CHAIRMAN TAYLOR said home rule cities now have authority for a differential tax structure but unified cities, because of city/borough unification, do not. He asked if HB 13 would change that so unified cities would have a differential tax structure.

REPRESENTATIVE BUNDE said unified cities might now have a differential tax structure.

Number 376

SENATOR THERRIAULT said last year he was concerned with the expense of a certain fire service area. He asked if this had been addressed on page 2, lines 19 through 22.

REPRESENTATIVE BUNDE said yes.

SENATOR THERRIAULT asked how the language worked if there was an existing service area with a valley portion and a hill portion and the people on the hill needed their roads sanded, which would be an additional expense. Would the new language allow an existing service area to "carve up a certain portion and go to the borough assembly and ask that they pay an extra quarter mill for something of that nature to allow for the sanding on their roads because the roads down the valley don't need to be sanded?"

REPRESENTATIVE BUNDE replied it would not affect an existing service area that could subdivide and a majority vote of both entities would be needed to subdivide. HB 13 calls for differential taxation if two entities want to combine for administrative savings within a subdivision.

SENATOR THERRIAULT said the mill rate within a service area is now voted on by the residents of that area. If there were a thousand people living in the valley and 250 people up on the hill, he asked if the people in the valley would be able to impose a higher millage rate on the people up the hill.

REPRESENTATIVE BUNDE replied yes, because the entire service area would vote it on.

SENATOR THERRIAULT asked if Representative Bunde would have an objection to adding language that said something to the effect of:

"generated differential millage rate monies have to be spent within the area that generated it."

REPRESENTATIVE BUNDE replied no.

SENATOR THERRIAULT said that HB 13 talks about subsets within the service area, but he did not know if there was language covering that.

REPRESENTATIVE BUNDE said subsets would still be separate service areas and they would only be combined to save administrative fees. Subsets would still have a differential taxation rate with the intent that Group A's level of taxation be spent on Group A and Group B's level of taxation be spent on Group B.

Number 715

CHAIRMAN TAYLOR said this could be a "real can of worms." It would be difficult to draft language that would specifically allocate where the funds were to be spent within a service area. He noted that whether this could or should be done would be a serious question.

REPRESENTATIVE BUNDE thought he had not explained the intent well. He said if there were two service areas, Group A and Group B, and they were combined and had differential taxation rates, the monies assessed on Group A would be spent on Group A and monies assessed on Group B would be spent on Group B. There would be no crossing of funds.

CHAIRMAN TAYLOR said he was not sure of this.

Number 785

MR. JEFFERY BUSH, Deputy Commissioner, Department of Community and Economic Development (DCED), started by following up on some of the questions asked earlier in the meeting. He said the administration did not oppose Sec. 4 of HB 13 but it was opposed to the rest of the bill. Sec. 4 allows the assembly, by ordnance, to establish differential taxation rates within service areas and that can be within an existing area. This is to allow for the consolidation of services areas so they can combine and have differential rates. Another question was regarding the requirement that additional assessments be used for the people who were assessed. HB 13 allows this by saying it allows for different levels of taxation to occur "for a different level of services than provided generally in the service areas." The implication being that when there are differential levels of service, a different differential rate can

be assessed.

MR. BUSH said this bill came to the Governor last year as HB 133. He vetoed it and he still finds it objectionable. The objection is not to differential taxation, the objection is to the rest of the bill, which the Governor views as limiting the power of municipal governments and boroughs by requiring service areas, which are not a government entity, to veto powers at the borough, which could otherwise be exercised at the borough, level. Alaska's constitution creates borough governments and there is a dispute over whether the constitution would even prohibit HB 13 because the state cannot limit the powers of boroughs except if there is an overriding state interest, and an overriding state interest has not been demonstrated in this case. An overriding state interest needs to be found before the power of boroughs and municipal governments are limited.

MR. BUSH said the provisions of HB 13 have already been provided for in the Anchorage Charter. There is nothing that HB 13 does that could not be done at the local level by local choice. The administration's objection is that this would be imposed at the state level on municipal governments.

MR. BUSH said the philosophy being demonstrated is somewhat inconsistent with the philosophy that is being otherwise debated in the legislature - the formation of borough governments is being encouraged and so is the centralization of local powers in unorganized borough into boroughs. Those efforts are being undercut by the arguments of HB 13 - that borough governments should not be the center of power and the power should reside in a smaller unit at the local level.

Number 1073

CHAIRMAN TAYLOR said on the philosophical question, "when you say being debated within these halls on the expansion and incentives to create borough governments," that he did not realize the administration shared any of those thoughts.

MR. BUSH replied that DCED had for many years consistently supported those efforts and he had pointed out that this was the department's position. The administration has no formal position on that yet.

CHAIRMAN TAYLOR said he was curious as to what the administration's position might be on the entire subject. He thought this was a subject worthy of consideration and discussion and he would like the administration participating. Chairman Taylor asked for a

recap on Senator Therriault's question on whether the funds could be assessed for specific services and allocated to that particular portion of the service area.

Number 1226

MR. BUSH said HB 13 implies that because it allows for increases or decreases of assessments based upon a different service for a particular group within a service area, that the adjustment be made on the amount collected. There is no requirement that the service area account for an exact dollar for dollar amount.

SENATOR THERRIAULT said if it were an extra quarter mill rate, it would just be that, multiplied times the value of the homes in the sub zone, and he felt that could be accounted for. He asked if Mr. Bush would see a problem with language that said, "except for administrative expenses, funds generated by the imposition of a differential tax in a differential tax zone within a service may only be used for services within that tax zone."

MR. BUSH said his only concern would be retaining separate accounts for service areas for the same service. He did not know if accounting problems would be created if administrative costs were added. He thought this link should be there but he did not know if it would be statutorily required.

Number 1380

MS. JEAN WOOD, speaking via teleconference from Palmer, said she supported HB 13. She felt that local control was the best control available and she thought the people affected should have a say in whether they wanted to be included in a service area if that area were to be changed. At one time the Mat-Su Borough had a differential taxation rate and when a subdivision in a service area wanted its roads paved, the property owners were assessed at a different rate than the rest of the service area.

MR. JOE BALASH, staff to Senator Therriault, said HB 13 does not prohibit various millage rates from being charged within a given service area and it does not prohibit one group in the service area from disproportionately benefiting from that assessment. He said it is conceivable that a base one mill could be charged on everyone, with the residents in a given area deciding that the wealthy people up on the hill should be charged an additional half mill to receive an additional service that only cost a quarter mill. The surplus quarter mill would be used to supplement the rest of the base. This is why legal services suggested that, conceptually, there should be some type of amendment to state that

the additional funds generated by the differential taxation rate only be spent within that differential tax zone.

CHAIRMAN TAYLOR noted that the committee had received written testimony from Mr. Jim Norcross of Willow asking for a limitation where HB 13 says, "or road service areas affecting not more than five percent of the total road miles of the service area, within a two year period."

SENATOR THERRIAULT said he would like to work on an amendment because he does not want one area to impose a higher millage rate on another area and then siphon the funds off.

CHAIRMAN TAYLOR suggested that Senator Therriault work with legal services to clean up the language in a way that would not change the overall concept of the bill.

CHAIRMAN TAYLOR announced that HB 13 would be held until the next committee meeting.
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#SJR 22
Number 1619

SJR 22-CONST. AM: JUDICIAL OFFICERS' TERMS

SENATOR DONLEY said SJR 22 changes the retention terms for justices. Terms for the supreme court would go from 10 years to four years and superior court terms would go from six years to four years. He said SJR 22 would have to be approved by the voters because it changes the constitution.

SENATOR ELLIS asked "why."

SENATOR DONLEY noted that in the majority of states, judges are either elected or confirmed by the legislative bodies involved. Alaska is in the minority of states that has neither of those processes but it does have retention elections. He said 10 year terms are too long for having a credible effect upon a judges performance, good government demands a shorter period. A memo in the committee packet from the court system only deals with those states that have retention elections, it does not examine states that elect judges or states that have a confirmation by legislative bodies.

SENATOR THERRIAULT said moving from 10 years down to four years was a big step and he was concerned that this would discourage private practice lawyers from serving in the judiciary. The system would

end up with a number of people who have spent their entire time in public service, with little understanding of what a judicial proceeding costs clientele, reflecting the way judgments come down and dragging the process out. He was concerned that by taking such a big step, fewer people from private practice would be willing to serve in the judiciary where the pay is substantially less.

SENATOR DONLEY said he would not have a problem with six and four year terms. He noted that according to the court system's response three other states have six and four year terms.

Number 1798

MS. STEPHANIE COLE, Administrative Director for the Alaska Court System, said the court system agrees with the Alaska Judicial Council's assessment of SJR 22. Ms. Cole made the following comments:

> The merit selection and retention process currently in place in Alaska is often sited nationally as a model, balancing judicial independence with judicial accountability, balancing a judges ability to make decisions impartially and without due political pressure against the public's important right to hold their judges accountable.
>
> Judicial accountability is enormously important and there is nothing incompatible with judicial accountability and judicial independence. There are three aspects of judicial accountability - political, decisional, and behavioral. When talking about political accountability, with reference to judges, this is the retention election process and how judges are held accountable to the public by periodic retention elections. At these elections, the public is given a large amount of information compiled and prepared by the Alaska Judicial Council.
>
> Decisional accountability relates to the issue of whether a judge is correct or incorrect in a particular case. This is primarily accomplished through the appellate process and through the route of appeal.
>
> Behavioral accountability comes into play when judicial misconduct is an issue, this is provided through the judicial discipline process and in Alaska that is the Commission on Judicial Conduct. It is the court system's position that when retention periods are shortened, a situation is created that starts to blur the distinction

between political accountability and decisional accountability. The current retention periods are in the mainstream of most states, and no other state has retention periods as short as listed in SJR 22. If retention periods are shortened, a situation is created where the judge is under increased pressure to rule in accord with the current political or public atmosphere. The whole system of government is structured so this will not happen. While the role of legislators is to respond in some part to the will of the majority of its constituents, the role of a judge is very different. A very large part of what a judge is asked to do is to protect the rights of a minority against which the rule of the majority should never be allowed to prevail. A judge has to apply a set of facts without regard to the public atmosphere or will of the majority. This is a difficult and often times unpopular task. The current system does allow at least some protection against a judge for being punished politically for a particular decision that he or she might make. When the period between retention elections is shortened, it is more likely that political campaigns would be waged against individual judges because of single unpopular decisions. Deciding high profile cases always requires judicial fortitude but is especially difficult if there is an eminent retention election. It would be a backward step, a step toward deciding cases in favor of the more powerful litigant to increase the frequency of retention elections. Another predictable result would be more campaigns against judges standing for election, since issues and tempers would have less time to be moved from the spotlight and into a longer term perspective. As campaigns are mounted against judges, judges have the right and they will respond with counter campaigns - they are allowed to do this.

Throughout the country today, there are serious concerns about judicial fund raising and campaigning. Fund raising can compromise a judge's ability to rule neutrally and to be perceived as neutral. Alaska has over 150,000 cases going through the court system every year and only a hand full of those are controversial or of general interest to the public, yet each one of them is of enormous interest to the people involved in those particular cases. Judges need to be evaluated at regular paced intervals about how they are handling all of the cases, not just one or two highly visible cases. Every litigant in the court should have the confidence that his

or her case is being heard on the merits, not on the basis of public or political pressure which can be brought to bear on a judge. The public would be outraged if the judge took a survey or political poll to determine how to rule on a particular case but SJR 22 does move the judiciary in that direction. The legal system commands allegiance only when the legal system commands respect and it only commands respect when the public believes judges are neutral. It would be a great loss if this position were eroded.

Aside from judicial independence concerns, the court thinks the periods between retention elections would discourage qualified applicants. Shorter periods between elections increase the likelihood that a judge would face an election challenge. Right now judicial salaries are falling relative to salaries in other states. An experienced, seasoned private sector attorney may have to drop his or her income one half to two thirds to take a judicial position. All of this discourages well-qualified attorneys from applying for the bench.

MS. COLE said the court system believes that maintaining the current system and the structural integrity of the justice system should be paramount. She urged the committee not to move SJR 22 forward.

Number 2143

SENATOR THERRIAULT asked for a list of judges who came to the judiciary from private practice or the public sector.

MS. COLE replied that list could probably be provided.

CHAIRMAN TAYLOR said that if a judge had a controversial case at the end of his or her sixth year term they might still face a contentious retention election. When it comes to decisional accountability and political accountability, unfortunately, courts politically decide issues. It is hoped that cases are decided on legal grounds but this is not always the case.

MS. COLE said Chairman Taylor was correct, highly controversial cases do arise close to the end of a retention period, but the system needed to be balanced. The constitutional founders thought long and hard about where the balance should be and they concluded that the terms currently in place provided for some accountability. The current system is not perfect but it is a good balance between accountability and independence.

CHAIRMAN TAYLOR asked how accountability is achieved when the first chance to vote on the retention of a supreme court justice is three years at the earliest after appointment. "This is assuming that the appointment coincided with the next two year cycle, it could be as much as four and three quarter years before there was an opportunity to vote on that justice. Then there is one other opportunity, and during that period of time, a supreme court justice would have served 23 to 25 years with an initial retention election, one retention election in the middle, and then deciding to withdraw rather than file for reelection in their 23rd or 25th year on the bench."

MS. COLE responded that the first period had to be long enough so a track record could be established, which would give the public time to evaluate a judges performance. If there were an immediate retention election, voters would be asked to make a decision on a judge who possibly had not made a decision yet. She said a 10-year retention is not at all unusual and is representative of other states.

TAPE 01-14, SIDE B

SENATOR THERRIAULT said he felt the six and four year retention terms suggested by HB 13 were too short for balance.

MR. BILL COTTON, Executive Director for the Alaska Judicial Council, said the judicial council is a separate independent agency in the judicial branch of government. The council is charged with two primary responsibilities - 1) Investigating and screening judicial applicants, and 2) Evaluating the performance of judges and making information available to the voters.

MR. COTTON said there were a number of reasons the judicial council was opposed to SJR 22. The council has opposed bills in the past that made retention terms six years for supreme court justices and four years for superior court judges, rather than four years for all, which is the case this year. The first reason for opposition to SJR 22 is that shortening retention terms would discourage highly qualified applicants from applying for a job because the job would be less stable. This particularly applies to private practitioners who have stable practices with good incomes. The second reason for oppositions is that the evaluation focus would be taken off individual judges and put on a larger group of judges. Last year over half of the judges were up for retention election, with the judicial council having to evaluate a long list of people, making it harder to focus on the few judges whose evaluation needed to be focused on. This also makes it difficult for the voters to

be knowledgeable on each judge. The intent of SJR 22 is to put more focus on individual judges but the actual practice may not do that. The third reason for opposition is that SJR 22 would increase costs for the judicial council's evaluation and for balloting. The fourth reason for opposition is that shortening the retention terms would change the balance between judicial accountability and judicial independence. The Alaska Judicial Council does a more thorough evaluation than any where in the country or world by surveying police officers, jurors, protection workers, court employees, and every attorney in the state - 10,000 Alaskans are asked to rate the judiciary and give comments. The council holds public hearings, receives information from the Court Watch, handles salary warrants, preemptory challenges, and it looks at how often appeals are overturned. Almost all of this information is put on the Internet where anyone can access it.

MR. COTTON said the council emphasizes judicial accountability but judicial independence is also very important. Judicial independence is one of the principals this country was founded on and the founding fathers wanted judges who would protect the rights of citizens even if it were not what the government wanted. Judges are needed who are smart and fair and who decide cases on the law rather than on whose before them, judges, who to the best of their ability uphold the constitutional rights of citizens even if their decisions are not popular. The judicial council in its retention evaluations is very concerned that judges do not decide cases based on their own political views.

MR. COTTON read a quote from the constitutional convention by Delegate Davis.

> Now historically, judges were 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 behind 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 a while 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 political pressure, a judiciary that will not be subject to pressure from the executive branch of the government. I moved to Alaska some 16 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.

MR. COTTON said the constitutional convention specifically voted down, by a large majority, a proposal to reduce the tenure terms of supreme court justices to six years and they also discussed four year terms. Mr. Cotton urged the committee to discuss the issue carefully.

MR. COTTON said that any system based on people would not be perfect, there would be mistakes and limitations. But the council feels the current systems is a good balance and he urged the committee to not pass SJR 22.

Number 1968

CHAIRMAN TAYLOR said he takes great pride in Alaska's judiciary, he thinks it is one of the finest in the United States but he also finds it somewhat incredible that:

> "while embroiled in the middle of a campaign in 1998, I watched my superior court first make a determination that campaign finance laws were unconstitutional. It took my supreme court about three days to move on that one and act. During which period of time there was a window, we all remember that one, when you could actually go out and solicit for different amounts of money, then that window closed with the supreme's making a decision and immediately following that, I watched other people file suits that would have significant impact upon that election if they were acted upon. You know something, it took them about a year and one half to even find the time for judges not to be on vacation, for judges to be available, for judges not to grant continuances one after another. And these very same people seem to have absolutely no comprehension of what the current Alaska Public Offices Commission and ethics requirements are on people who volunteer to serve at a range today that is somewheres beneath the poverty level. At least, I think my family could certainly qualify today for Denali Kid Care, I think the salary that I receive is at least somewheres below the 200 percent of poverty level. At the same time, there seems to be little appreciation or contemplation of what the role is of the judiciary in righting wrongs during the political campaign. Instead the continued - oh, we'll put that one off - justice delayed is justice denied. I have members of major communities that have come to me that have cases currently pending that were argued over three years ago and they still haven't received an opinion out of the supreme court. And that involves major contract disputes, the city of Anchorage as a consequence, they've had to come up with a working solution in between because they don't have a yes or a no to their question. This is costing them hundreds of thousands of dollars. They seem to be frustrated at that, I share that frustration. I

know how it has affected the politics within this state when this court has failed to act, yet chosen in the same campaign to act expeditiously when they thought it was important for them to act. I really have come back down to the place where I really am at the opinion that maybe it is high time that some of the folks in the ivory tower found out what it's like to rub shoulders with the masses a little more often. And if it's six years or four years or whatever if that happens to hit unfortunately when a hot case is around, that's part of the luck of the draw. And do I want to see judges raising $2 million to go out and do campaigns, no I really don't want that system but maybe I want a judiciary a little more sensitized to those of us who must comply with some of the laws and their interpretations of some of these laws. Maybe they ought to join that fray for a little while and get a true appreciation of it, cause this would certainly do that. They would get back to the table a little more quickly I think. But that's just a comment on my part, that's a level of frustration I have with the system. Whether this would, in fact, help that or not that's, as Dennis Miller would say, that's just my opinion and I could be wrong.

SENATOR DONLEY said he shared the same concerns as Chairman Taylor with the whole issue. He finds it incredible that the judicial council recommended all the existing members of the supreme court to be confirmed or retained this year when some of the judges have had cases pending for over two years without a decision. He does not understand how the judicial council, in good conscience, could say those people were doing their job properly. He said the constitution's mandate of informing the public and representing the public interest is not being met. Senator Donley said the council had ignored his request to comply with its own ethical standards regarding the membership voting on issues, it ignored his request to make available to the public the outstanding warrants questioned by submerging the information on the web site so that people had to know exactly where to look for the information. He does think there should be a balance between judicial independence and accountability but right now the judiciary leans totally toward independence with no accountability. SJR 22 is logical and consistent, especially with six years for the supreme court. Senator Donley said the judicial council had also failed to hold some judges accountable for injecting their own political beliefs into the decision process. "All you have to do is juxtapose the Best decision against the opinions that have been coming down trying to utilize the powers of the executive branch in appropriation, to see that they are entirely inconsistent with

their own internal decisions." He said the Best opinion was an outrage, it was a very lousy piece of judicial work and the council failed to hold them accountable for that work. If this is the state of law in Alaska, then things coming out of the superior courts cannot be reconciled regarding the right to privacy with the Best opinion. The right to privacy and the Best opinion are completely inconsistent and the judicial council failed to hold the judiciary accountable for that inconsistency, which can only be based on political belief.

MR. COTTON said the judicial council gathers more information on all aspects of how judges do their work than anywhere else in the United States. The judicial council presents a tremendous amount of information to council members and the voters, and with regards to the Best case, council members seriously considered all information and concluded the Best case had not been based on a judge's political whim. Mr. Cotton agreed that judicial delay is a problem and the council has addressed this issue over the years. The council has asked the supreme court for briefings on how it is addressing delay problems, and the supreme court has now issued time standards for the trial and appellate courts. Developing a case management system that would give the council competent information would also be a step forward and the council has considered proposing that the salary warrant information time period be shortened. The council is now considering how it can do better case processing.

MR. COTTON emphasized that council members are from all sorts of perspectives and have concluded that Alaska has a good system and judges are doing a good job.

SENATOR THERRIAULT suggested that in order to be retained a judge should be approved by 55 to 60 percent of the voters.

MR. COTTON felt that raising the level would assure that if there were any controversy about a judge that judge would be out of office, and he would not be in favor of that.

MR. BRUCE WEYHRAUCH, private practice attorney, president and member of the Board of Governors for the Alaska Bar Association, said he felt SJR 22 was important enough for him to speak on his own behalf. He said judicial independence is critical to the constitutional form of government. When the framers of Alaska's constitution had the opportunity to review what other states were doing, they adopted a constitution that struck a balance between what other states had done with lifetime appointments and the retention election process. As an attorney, Mr. Weyhrauch felt that Alaska's judges were very good. In benchmark conferences and

open forums judges hear the public and this is something that needs to continue, it helps address some of the public's concerns and the "ivory tower issues." There will always be tension between the legislature, the executive branch, and the judiciary and that is the way the system was meant to be. Mr. Weyhrauch trusts the judiciary system and he imparts that trust to his clients by saying that judges are doing the best they can based on law and precedent and despite a lot of political pressure, courts rule with precedent. The principal decision a court makes should be based on existing law so that the private sector can operate with a certain amount of certainty. Mr. Weyhrauch said that if retention elections were shortened, a person in the private sector would have to get rid of his or her client base and business before becoming a judge, and the shorter the retention process the less likely the judiciary would be considered a livelihood option.

SENATOR DONLEY asked what percentage of judge's come from the private sector.

MR. WEYHROCK said most come from public service but it is a "mixed bag." He said many attorneys' general see the judiciary as a career step.

Number 1143

SENATOR DONLEY said Mr. Weyhrauch's response would discount the argument that people would not come to the judiciary because of a reduction in income. He asked if income should measure a candidate's viability to be a good judge.

MR. WEYHRAUCH said the majority of people interested in the judiciary want to work in this area and have proven their ability to look at the law and be impartial.

SENATOR DONLEY said consistency is wanted from the judiciary and a public safe guard is needed to assure consistency and 10 year terms do not enforce consistency. He asked if a six-year review would be objectionable.

MR. WEYHRAUCH said there is a mechanism in the superior court for consistency through appeal if it is felt there has been an inconsistent result with precedent. In the supreme court the mechanism exists for moving to reconsideration or for appealing to an even higher court if there are constitutional grounds for an appeal. He was concerned that a judge could be thrown out of office because of a disagreement over a decision, when in their own intellectual capacity and through their own analysis of the law and precedent of the facts, they applied the law as best as they could.

SENATOR DONLEY said the delegates to the constitutional convention determined that the existing retention terms were appropriate terms of office but he wondered if the delegates had ever envisioned some of the things the courts have done in a very activist creative manner over the past several decades. He said the constitution needed to be reexamined on a regular basis to see if it is really working. He thought that if the delegates had envisioned the types of decisions crossing the separation of powers they might have reevaluated the terms.

Number 813

JUSTICE RABINOWITZ made the following comments:

> Thank you very much for giving me the opportunity to meet with you. I just came from Bartlett [Hospital] so that's my excuse if I'm a little disjointed. I've been apprised of what's on the agenda, the periodic evaluation of not only the supreme court, the superior court judges, but by legislation, and the court of appeals. Present terms are ten, six, and eight for the court of appeals. Let me say this, what we're dealing with is the constitution. You've alluded to 1955, the founding fathers had so called expert advise on the Article IV of the constitution. I've fortunately devoted and had the privilege of surviving retention elections very closely, serving in the Alaska judiciary since 1960, and I'm still serving in the capacity as a pro-tem or senior justice and helping out at both levels and it's a great treat to work at all levels of the court system. When I first came on in 1960 and then was elevated because of Justice Aaron's defeat by the bar association in the retention election to the supreme court, that's how the vacancy occurred. I became familiar with the workings of the judicial council. This is a fundamental document that we're talking about, this is our basic law. And naturally in 1955 the founding fathers didn't know how the judicial article was going to work. Well, you can dismiss this as ego blowing but I think the Alaska system has matured and it's an incredible tribute to the flexibility that was built into Article IV - that Article IV has functioned. I know you're upset with some opinions but I've seen the growth of the judicial council, I happened to be ex officio chair when we were struggling with how to make the council work. The council to this day has matured, where it is leading the Missouri states in how to get an informed electorate and

how to get a vote on the performance of judges at these various levels. Now this is a compromise, you all know that, we don't have the federal system and lifetime appointment, we've given the voters a say in the performance of the judiciary. There is no other state, and I really will defend this, that gives the voters as much information as we do and as close an analysis as we do on the performance of the various judges at the various levels that have to stand periodically. Now I assume you've heard the arguments as to why we shouldn't shorten the opinion. One I think will send the wrong signal to those 20 or so Missouri states that have the plan - that there's something wrong with our plan. Is it working? Do the voters get enough information? Why change it? Is there a real need to change the fundamental doctrine of our government because some of the opinions don't sit well? You've mentioned inconsistent opinions. My god, does the ordinary citizen know what the supreme court has done over a ten year period? No. Is the supreme court aware of what they've done? Sure. We have the Doctrine of Stare Decisis and that's a very powerful doctrine. And let me tell you, in our internal debates, we're very very hesitant to overrule decisions just on a whim of public opinion. You're going to get bad opinions once-in-awhile, how can you get uniformity when you have 60 judges and 60 different philosophies, 60 different backgrounds, different factual contexts, eventually you'll get some inconsistency and it's up to the supreme court to straighten it out. But it's hard enough to get the information to the ordinary voter and if you truncate everyone in to one period, it's going to lead to a laundry list that's going to make it meaningless in the election pamphlet and the information from the judicial council gets out to the voter. My plea with you is if it's not [broken] don't change it. This is the lifeblood of the Alaska government. This is an article that has worked. I know you say, dismiss it, Rabinowitz has been there too long, he's part of the system. But I've seen the system mature. Article IV has worked brilliantly. And of the 22 or 24-merit selections, merit retention states, we seem to be guiding them in the field of representative democracy. We're the one state that lead the way in evaluation and getting information back to the electorate. I don't think we should confuse it by adding to the laundry list, adding to the costs and it might discourage, might discourage the practitioner who says every four years, I'm not going to do that and give up a

great practice. We need a balance between private practitioners, public practitioners and I think we're getting that.

What I said I would be proud of is the growth of the judicial council, again the one thing I would urge is this is the constitution that we're dealing with and I'd be slow to change it if it's working or to recommend a change. I don't see any real hard significant evidence that the periodic evaluations we have now are failing to do what we're attempting to do. I think given the broad mandate, you should allow us to continue with the time frames we have until it's shown it really is not performing the function that we're trying to achieve. But we've gone a long way since 1960 and Alaska is a leader in this field and I wouldn't want to send the wrong signals to the other Missouri states, I wouldn't want to unduly complicate and dilute the system we have now. That's my plea to you Mr. Chair and the committee.

JUSTICE RABINOWITZ said it had been exciting to see what the council has done. He was chairman four times and during that time there were intense discussions on how to make the constitution work. He felt Alaska's constitution had been working well and that it had been a brilliant success. Alaska has a corrupt free judicial system, some judges miss the mark but most do not and the low appeal rate confirms this, which is a tribute to the scholarship of the sitting judges.

SENATOR DONLEY said he was concerned about the two and three year court delays. He asked if this was a new phenomenon.

JUSTICE RABINOWITZ said when he was "chief" he proposed time standards for the supreme court but he could never get them adopted. Now for the first time, stringent internal standards have been adopted to get the opinions out. "Your six month legislation, we tried to abide by and most of the time when I was on the court we adhered to the six month deadline. The trouble was if you got your opinion out on a very complicated case, say I was assigned a direct case, and you got it out within six months and someone disagreed with it there was no internal hammer to make the other justices to get out his concurs or her decent. And that's what delayed the opinions. Now I understand there are one or two real clinkers that are around there for three years now and they'd better look at that. But for the most part, we do strive to meet that six-month deadline and even beat it. We've got a fast calendar now on 'MO'S and J's' and I think they're improving in this area. But you've identified an Achilles' heel and that is

there haven't been stringent internal time standards. But they have them for the first time now they adopted them. I'm looking forward to good faith adherence to them."

TAPE 01-15, SIDE A
Number 001

SENATOR DONLEY asked why the voters guide did not have information about how many times a judge had not complied with the warrant requirement or about current delay.

JUSTICE RABINOWITZ said the judicial council should take up that suggestion. He said this information had not been tracked, but it would be another way to get judges, who are slow, to clean up his or her act because they would not want this information to go before the electorate. There is no reason this information could not be collected and could be a recommendation.

Number 150

CHAIRMAN TAYLOR said the information had been compiled but it was only accessible through the Internet and only accessible if a person knew all the steps to take.

MR. LES GARA said he had practiced law in Alaska since 1988 and has had the privilege of going through Alaska's constitutional history. He hoped the legislature would not disrupt the balance that the 55 delegates to the constitutional convention came to without reading through the debates first. The delegates spent the good part of a year researching what every other state in the country had done to try and insure impartiality and accountability of the judiciary. Mr. Gara felt they struck a wonderful balance. One of the delegates, Mr. George McLaughlin, said "the more you make a judge run the more you threaten to pressure a judge to render decisions that are 'politically correct.'" If judges were politicians they would run every four years but they are not and that is why the system of letting them run every six, eight, and ten years makes sense. During the last election there were 20 judges on the ballot, and Mr. McLaughlin heard many complaints about there being too many people on the ballot at one time for an informed decision. If judges were to run every four years there would be 40 judges on the ballot at one time, making it very hard for voters to make intelligent decisions.

MR. GARA said he felt that judicial delay should be addressed in another bill and should not be included with retention terms.

MR. GARA noted that Alaska has been pointed out by other states as

a shining light in this area. He said Alaska's judiciary is the most impartial and independent judiciary in the nation and the constitutional system should not be altered.

SENATOR DONLEY moved to amend SJR 22, lines 11 and 12 to read:

> every sixth [TENTH] year [, AND EACH SUPERIOR COURT JUDGE, EVERY FOURTH YEAR].

SENATOR DONLEY said this amendment would be consistent with the states of Arizona, Kansas, and Oklahoma.

CHAIRMAN TAYLOR asked if there was an objection to the amendment. There being no objection, amendment 1 passed.

Number 851

SENATOR DONLEY said for the record:

> I think in trying to seek a balance here, I understand the argument that having longer terms can help reduce political influence. At the same time, lack of accountability can increase political influence too. Right now, I think the balance teeter totters a little to far to the lack of accountability. I think that over the last 50 years the notion of how judges behave and act has changed rather dramatically. We went through the years of the Warren Court and the vision that, the sense or understanding of the judicial branch that was present in the early 1950's or the mid 50's, I think is quite different than reality today. I think there are a lot more political agendas on the part of our judiciary today than we saw in the 50's. It stemmed really from the activist courts of the 60's and lead us to where we are today with a much more active judiciary, possibly with the exception of our newer members of the slowly evolved unto our United States Supreme Court, which have come from more conservative presidents. So that I do think there is a different situation today than was found in the 50's as far as the general impression or understanding of how the judiciary works or what the role of a judge or justice in society is. I think to help temper that political influence I think that bringing these terms down will actually help make them less political rather than more because of the shift in how they generally operate compared to how they did 50 years ago.

I appreciate the arguments that have been made, I think they're influential and good credible arguments. At the same time when you factor in the societal changes that have occurred since the constitution was drafted and the fact that many other states are functioning very well with shorter terms that I think this is overall the best public policy decision.

SENATOR ELLIS asked about the status of SB 161.

CHAIRMAN TAYLOR responded that it would be heard at the next meeting.

SENATOR DONLEY moved CSSJR 22 from committee with individual recommendations.

SENATOR ELLIS objected. He thought this was a premature action in light of the testimony and given the fact that SB 161 was coming to the committee. He asked to have CSSJR 22 considered in the context of SB 161 since SB 161 would address some of the problems brought up during this meeting.

SENATOR THERRIAULT said he would also like CSSJR 22 held because he had requested information from Ms. Cole and he would like to review it before passing the bill out of committee.

SENATOR DONLEY withdrew his motion to move CSSJR 22 from committee.
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There being no further business to come before the committee, CHAIRMAN TAYLOR adjourned the meeting at 3:34 p.m.