ALASKA STATE LEGISLATURE
SENATE JUDICIARY COMMITTEE
April 20, 2001
1:46 p.m.

MEMBERS PRESENT

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

MEMBERS ABSENT

All Members Present

COMMITTEE CALENDAR

CS FOR HOUSE BILL NO. 32(JUD) am
"An Act relating to the forfeiture of property used to possess or distribute child pornography, to commit indecent viewing or photography, to commit a sex offense, or to solicit the commission of, attempt to commit, or conspire to commit possession or distribution of child pornography, indecent viewing or photography, or a sexual offense."
HEARD AND HELD

SENATE BILL NO. 161
"An Act relating to the withholding of salary of justices, judges, and magistrates; relating to requiring prompt decisions by justices, judges, and magistrates; and relating to judicial retention elections for judicial officers."
MOVED CSSB 161(JUD) OUT OF COMMITTEE

PREVIOUS COMMITTEE ACTION

SB 161 - See Judiciary minutes dated 4/9/01.

WITNESS REGISTER

Representative Joe Hayes
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Sponsor of HB 32

Sergeant Chuck Kopp

Alaska Peace Officers Association
107 South Willow
Kenai, Alaska 99611
POSITION STATEMENT: Supported HB 32

Lieutenant Dunnigan
Department of Public Safety
PO Box 111200
Juneau, AK 99811-1200
POSITION STATEMENT: Supported HB 32

Mr. Marc Poeschel
Interior Alaska Forces Task Force
PO Box 755560
Fairbanks, Alaska 99755
POSITION STATEMENT: Supported HB 32

Ms. Stephanie Cole
Alaska Court System
303 K Street
Anchorage, Alaska 99501
POSITION STATEMENT: Opposed SB 161

ACTION NARRATIVE

TAPE 01-20, SIDE A
Number 001

CHAIRMAN ROBIN TAYLOR called the Senate Judiciary Committee meeting to order at 1:46 p.m. Senator Ellis, Senator Therriault, Senator Cowdery and Chairman Taylor were present. Senator Donley arrived at 2:15 p.m. Chairman Taylor announced the first order of business would be HB 32.

#HB 32

HB 32-SEX CRIME AND PORNOGRAPHY FORFEITURES

REPRESENTATIVE JOE HAYES, sponsor of HB 32, said if a person was convicted of a sex crime for distributing child pornography through the Internet or if they were convicted for knowingly enticing minors thorough Internet chat rooms their computers and equipment would be seized and used by law enforcement. Representative Hayes said he had letters of support from law enforcement organizations and he had also received one letter of opposition from a naturalist group in Wisconsin and their concerns had been addressed. At one point HB 32 was too broad and there was a concern that real property could be taken, but the definition had been refined making

the wording more specific to computers and computer related items.

SENATOR COWDERY asked if cell phones and hand held radios could be taken.

REPRESENTATIVE HAYES said the definition of property was on page 2, lines 5 through 10, and cell phones and hand held radios were not listed.

SENATOR ELLIS asked for a definition of child pornography. He said people send pictures of their children to relatives through the Internet, and sometimes the children are "naked on a bear skin rug, and it's just a baby." He wondered if there was a clear definition and a way to discriminate between naked baby pictures and what would be considered child pornography.

REPRESENTATIVE HAYES said the definition was referred to in the bill through statutes AS 11.61.123 - 11.61.127.

SENATOR ELLIS said that police now seize computer equipment from crime scenes and he asked if HB 32 allowed law enforcement to retain the seized equipment or was it to be auctioned for law enforcement resources.

REPRESENTATIVE HAYES noted that law enforcement does not have adequate resources for the latest computer technology and HB 32 would allow for the seizure of property and, after a conviction, use the property. The equipment would not be sold.

SENATOR THERRIAULT asked if law enforcement could sell the equipment.

REPRESENTATIVE HAYES said there was nothing from prohibiting law enforcement from selling the equipment but the intent of the legislation was to allow law enforcement to use it.

SENATOR THERRIAULT said that there was sometimes criticism of law enforcement for seizures so, "they can get their hands on assets or cash." He asked if the property was sold, would law enforcement automatically have access to the cash or would the cash accrue to the state treasury where it would sit until the legislature appropriated the money back.

REPRESENTATIVE HAYS explained that selling the equipment had never been discussed, the intent of HB 32 was to give law enforcement the use of newer, more modern equipment. The seized computers would have the perpetrators web addresses and connections, which could be used for the apprehension of other criminals.

SENATOR THERRIALUT said the intent section of HB 32 asks the courts for protection of innocent third parties who may have an ownership interest in the equipment so that their equipment would not be seized.

Number 570

REPRESENTATIVE HAYES said that was correct. The intent wording was added to give reassurance that an innocent third party would not have his or her computer taken.

SENATOR THERRIAULT asked if a sexual offender with a prior conviction was staying in someone's home and using their computer, would the homeowner need to lock up his or her computer equipment to keep it from being seized.

REPRESENTATIVE HAYES said the intent language stated that third person property could not be seized, so even if a sexual offender were to use a homeowner's computer that computer could not be seized.

SENATOR THERRIAULT asked if the "firewall" protection was specifically directed to child pornography.

REPRESENTATIVE HAYES said he was not sure of the answer.

SENATOR COWDERY asked where the money goes after the sale of seized property.

CHAIRMAN TAYLOR said there were people on teleconference who could probably answer that question but there were other questions to be addressed at that point.

SENATOR THERRIAULT said he also had a concern with the definition of child pornography and wondered if the statute had a good definition.

SENATOR ELLIS responded there was a good definition in the statute.

Number 808

SENATOR ELLIS said people receive a lot of unsolicited information through email. He asked if someone viewed unsolicited child pornography and then deleted it, would they have to download the offensive material or would just looking at it cause a person to be caught up in a criminal investigation.

REPRESENTATIVE HAYES said a person would not be convicted of a crime for looking at an unsolicited pornographic email.

SENATOR ELLIS said the intent appears aimed at the person producing the material and distributing it through the Internet, presumably for money.

REPRESENTATIVE HAYES said money does not have to be involved for this to be a crime.

SARGEANT CHUCK KOPP, Alaska Peace Officers Association (APOA), speaking via teleconference from Kenai, thanked Representative Hayes for introducing HB 32. He said the intent for the seized equipment was for law enforcement use. When seized equipment is sold the money goes into a municipal general fund and it is not immediately appropriated back to the department but this rarely occurs because seized equipment is usually put to immediate use for law enforcement purposes. He said evidence had to be downloaded to the hard drive and stored before the state could collect it. This was to protect people who receive unsolicited email or people who might want to view pornography. Viewing is different from possessing something on a hard drive. Sergeant Kopp said APOA supported HB 32.

CHAIRMAN TAYLOR noted for the record that:

> The purpose of this law, as I discern it, is to remove this equipment from its criminal use. That it is sold or destroyed or utilized by enforcement is really irrelevant. And I would hope that this record is not becoming one of 'the department needs these tools so therefore we'll pass a law to confiscate and forfeit equipment.' That's really kind of a bad public policy to be discussing, I think, sets the wrong tone. I'm reviewing this legislation because I believe this equipment needs to be removed from the criminal element. If sold, the general fund or the department or if it's a municipality might have some additional resources. We confiscate, utilize, and even sell aircraft, boats, and automobiles. They don't always end up being utilized merely by the department and I don't want to give anybody in the listening audience or anybody considering this legislation, the thought that it is being passed solely for the purpose of going out and confiscating a few hot computers so we can take - that we wouldn't provide for the department through their budget. In fact, I happen to know an area of the department's budget where they could have a million dollars today if they'd just tell

one prima donna to quit flying around on an airplane. Nobody seems to want to do that but needless to say it would buy an awful lot of good computers.

Number 1265

LIEUTENANT DUNNIGAN, Department of Public Safety (DPS), testifying via teleconference, said the department supported HB 32. He said that if the court determined the equipment should be forfeited it would be turned over to the Department of Administration and sold. The money would then go into the general fund unless the court specifically assigned it for a law enforcement need or purpose.

MR. MARC POESCHEL, Coordinator for the Interior Alaska Forces Task Force, testifying via teleconference, said the task force has all the agencies in the Fairbanks area working together to combat computer crime. HB 32 would remove equipment from offenders, forcing them to buy new equipment if their intent was to offend again. He said HB 32 sends the message that Alaska will not put up with that type of crime. He said the task force supports HB 32.

Number 1481

CHAIRMAN TAYLOR said the sentence structure on page 1, line 9 may be incorrect and could be clearer. The sentence reads:

> INTENT. The legislature recognizes these forfeitures as in personam and, as a matter of consistency and fairness, instructs the courts to continue to provide, as they consider reasonable, remission to innocent parties who have an ownership interest in the equipment forfeited.

CHAIRMAN TAYLOR said in personam refers to title, ownership, and use, whereas, in rem refers to the forfeiture of an object.

REPRESENTATIVE HAYES said that language was presented the day HB 32 was heard on the House Floor and the body approved it. He said he was amenable to any clarification of the language.

CHAIRMAN TAYLOR said he would like legal services to redraft the bill for a clearer definition.

SENATOR ELLIS asked how soon the chairman expected the changes.

CHAIRMAN TAYLOR responded he expected the changes by Monday.

SENATOR THERRIAULT asked if HB 32 was to be held for final action or should there be a conceptual amendment.

CHAIRMAN TAYLOR said he would like to see the new bill before moving it out of committee.

SENATOR THERRIAULT said his preference would be to have the new language in "plain English."

CHAIRMAN TAYLOR announced HB 32 would be held until Monday.
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#SB 161
Number 2301

SB 161-NO PAY FOR JUDGES UNTIL DECISION

SENATOR DONLEY acknowledged a previous hearing on SB 161 and said there had been a discussion with representatives from the court system and they felt that six month terms were an appropriate time for the initial decision of a case. The CS before the committee would change the time from four months back to six months and there would be a 12 month limit for appellate courts for which there is no effective limit now. There would now be six months for the initial decision and six months for the final decision. SB 161 also provides a two month time to assist with new judges who have not heard an oral argument for a case they have been assigned.

SENATOR THERRIAULT thanked Senator Donley for making those changes.

CHAIRMAN TAYLOR said he had been involved in a teleconference with the Alaska Judicial Council and discussed with Chief Justice Fabe and members of the council some of the concerns they had about pending legislation. He was pleased with the council's response and their willingness to work with the legislature and the court system.

SENATOR THERRIAULT moved to adopt CSSB 161(JUD), \O Luckhaupt, as the working document of the committee. There being no objection, CSSB 161(JUD) was adopted.

Number 1949

MS. STEPHANIE COLE, Administrative Director, Alaska Court System, testifying via teleconference from Anchorage, said the new CS was still problematic. The proposed legislation, in its original form and the new CS, is almost certainly unconstitutional because of the doctrine of separation of powers as elaborated in the three main cases she discussed with the committee at the previous hearing. The cases dealt with the efficient and effective functioning of the

court system, which was a matter of court administration within the exclusive authority of the judicial branch. The cases found constitutional flaws based on the impairment clause and the prohibition against issuing judicial salaries during terms of office.

MS. COLE said the CS still had a provision that would stop an appellate judge or justice's salary if an opinion or decision was not issued within one year, regardless of the assignment of that case, and this was fundamentally unfair. SB 161 would make a justices salary dependant on factors totally beyond his or her control. She said a justice could be doing his or her job in an efficient and timely manner and could individually be meeting all time standards, but that person's paycheck would stop if the entire court did not issue an opinion in a certain time frame. The judge or justice in that circumstance would have no control over the actions or inactions of the other justices. She said there was no other provision like that in any law that the court system has been able to locate.

MS. COLE said there were 20 cases before the supreme court that were over one year in age. Those 20 cases are out of 465 cases before the supreme court, 220 of which are fully briefed and awaiting opinion. Out of the 220 cases, 20 are over one year in age. The 20 cases are different from the majority of cases the court handles, being more complex and more likely to have a split decision. If SB 161 were to pass and become effective, all paychecks for the supreme court would immediately stop. This would precipitate a challenge to SB 161 especially since the rule was a no excuses rule, not allowing a good cause exception, which allows for time to be exceeded or extended for good cause. It seems likely that a challenge to a provision like that would call in to question the constitutionality of the whole scheme, not just the provision. The supreme court has no ability to control the number of cases that come before it. Since there is a right to one appeal per case as a matter of right, the only way to ensure that the supreme court would have the control to allow it to meet these deadlines would be to create an intermediate court of civil appeals, as reflected by the fiscal note. Also reflected in the fiscal note are two additional staff positions for the criminal court of appeals. Additional judicial resources may be needed to meet the 12-month deadline in the criminal court of appeals but the fiscal note just reflects two additional staff people.

MS. COLE explained that under Section 2 of the CS the courts administrative director was required to report certain information to the lieutenant governor. Salary warrant information and information about why a judge or justice had not been issued a

salary warrant is the type of information that would need to be reported, and the court has no problem with doing that if the information is readily available. The other information described would be impossible to gather and would not produce meaningful data. The provision requires data on all opinions and decisions, the counting of those opinions and decisions, and to report the time frame of those decisions and opinions. She said judges make dozens of decisions every day and it would be impossible, with the courts current computer system, to identify all the actions that constitute opinions and decisions of a judicial officer and to collect that data.

MS. COLE said the current legislation uses very general language about when the time starts running on when a decision has to be made. SB 161 instead attempts to detail the milestone at which the time period under advisement begins to run. The milestone for supreme court cases in which no oral argument is requested is defined as the filing of the last responsive pleading. That is not an appropriate milestone because there is no justice to write the decision at that point. These cases would be scheduled for conference discussions on the same track and the same time frame as cases for which oral argument has been requested. So if two cases are filed on the same day and only one case has requested oral argument, conference would occur in the oral argument case immediately following the oral argument. Conference would be scheduled on the non-oral argument case within a week of either side of the oral argument. In that way the court ensures that no advantage or disadvantage occurs as a result of a request for oral argument. The initial conference is when the court meets on that case for the first time and decides on a tentative ruling and the case is assigned to a justice for preparation of the decision. The initial conference therefore is the milestone at which time periods should start to run against an assigned justice.

MS. COLE said SB 161 represents an unconstitutional violation of separation of powers and the structure it seeks to impose on the appellate court, which can result in a judge or justice losing a paycheck through no fault of that person.

Number 2301

SENATOR DONLEY told Ms. Cole he would be happy to entertain any changes she suggested for Section 2 as far as clarifying what types of decisions or opinions are being referred to. The difference between the final oral argument and a non-oral argument and when they are assigned would be made up by the additional 6 months provided.

MS. COLE said an initial conference would be more appropriate than last responsive pleading as a milestone for supreme court opinions.

SENATOR DONLEY said that did no good because there would not be a conference, it would be delayed. That would not be an objective standard because it would be under the control of the judiciary, which could give itself unlimited time for making a decision by just not having an initial conference.

MS. COLE said the court recognized and agreed that time limits were something that had to be a concern and unnecessary delays had to be avoided.

SIDE B

SENATOR DONLEY moved to add a delayed effective date of January 1, 2004, which would add a new section. That would give the court more than two years to clean up its docket of cases that are more than two years old.

CHAIRMAN TAYLOR asked if committee members understood the new motion. There were no questions and no discussion. There being no objection, amendment 1 passed.

CHAIRMAN TAYLOR said the constitution provides that the Alaska legislature, by a two-thirds vote of each house, can amend court rules. He asked if the rule the legislature was amending was only effective on the parties.

MS. COLE said she would like to think about that answer and respond in writing.

CHAIRMAN TAYLOR thanked her for her candor. He said the legislature was the body under the constitution that creates the jurisdiction of the courts and it is the only one empowered to create courts. As a consequence of being the body that has the authority to create the system, it has no authority over that body once it has been created. He said the legislature was not trying to bring about a constitutional challenge or conflict, but it was asking for assistance to find a way to solve cases faster so that justice would not be delayed through denial.

Number 2168

MS. COLE said the supreme court of Indiana ruled in a case on the issue of payroll salary warrants, and the ruling was that even though a statutory court, created by the legislature, derives its judicial powers from the constitution, it was no more subject to

regulation by the legislature than courts created by the constitution itself. It decided that once a court was created its powers come from the constitution and not from the legislature.

SENATOR DONLEY moved CSSB 161(JUD) from committee with individual recommendations.

SENATOR ELLIS objected. He said that specific questions had been asked of the court and that it would be prudent to wait for those answers before moving the bill out of committee.

CHAIRMAN TAYLOR said that SB 161 had been in committee for quite some time and he wanted to send it to the Finance Committee where they could look at these questions.

A roll call vote was taken with Senator's Donley, Cowdery, Therriault, and Chairman Taylor voting yea and Senator Ellis voting nay. CSSB 161 moved from committee with individual recommendations.
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There being no further business to come before the committee, Chairman Taylor adjourned the meeting at 2:44 p.m.