

ALASKA STATE LEGISLATURE
SENATE JUDICIARY COMMITTEE

April 15, 2002
2:36 p.m.

MEMBERS PRESENT

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

MEMBERS ABSENT

Senator Robin Taylor, Chair

COMMITTEE CALENDAR

SENATE BILL NO. 231
"An Act relating to correctional facilities."
HEARD AND HELD

HOUSE BILL NO. 375 am
"An Act making corrective amendments to the Alaska Statutes as recommended by the revisor of statutes; and providing for an effective date."
HEARD AND HELD

SENATE BILL NO. 159
"An Act relating to retention elections for judges of the court of appeals."
HEARD AND HELD

PREVIOUS SENATE COMMITTEE ACTION

SB 231 - See CRA minutes dated 3/20/02 and Judiciary minutes dated 4/10/02.

HB 375 - No previous action to record.

SB 159 - See State Affairs minutes dated 5/05/01 and 4/4/02.

WITNESS REGISTER

Mr. Jim Elkins
Ketchikan Gateway Borough
344 Front St.
Ketchikan, AK 99901

POSITION STATEMENT: Supports SB 231

Ms. Jody Simpson
Matanuska-Susitna Borough
350 East Dahlia Ave.
Palmer, AK 99645

POSITION STATEMENT: Supports SB 231

Mr. John Mapes
No address provided

POSITION STATEMENT: Supports SB 231

Mr. T.C. Kamai
Kodiak Chief of Police
10 Mill Bay Rd.
Kodiak, AK

POSITION STATEMENT: Supports SB 231

Ms. Nancy Webb
Fairbanks North Star Borough Assembly
PO Box 71267
Fairbanks, AK

POSITION STATEMENT: Supports SB 231

Mr. Jerry Burnett
Staff to Senator Lyda Green
Alaska State Capitol
Juneau, AK 99801-1182

POSITION STATEMENT: Answered questions for the sponsor of SB 231

Ms. Pam Finley
Legislative Affairs Agency
Legislative Legal and Research Services
Alaska State Capitol
Juneau, AK 99801-1182

POSITION STATEMENT: Answered questions about HB 375

Mr. Larry Cohn, Executive Director
Alaska Judicial Council
1029 W Third Ave., Suite 201
Anchorage, AK 99501-1981

POSITION STATEMENT: Opposed to SB 159

Mr. Chris Christensen
Alaska Court System
303 K St.
Anchorage, AK 99501-2084

POSITION STATEMENT: Opposed to SB 159

ACTION NARRATIVE

TAPE 02-17, SIDE A

Number 001

VICE-CHAIR DAVE DONLEY called the Senate Judiciary Committee meeting to order at 2:36 p.m. Senators Cowdery, Therriault and Donley were present. The committee took up SB 231.

#SB231

SB 231-CORRECTIONAL FACILITY EXPANSION

VICE-CHAIR DONLEY informed members the committee already had one hearing on SB 231. He then took public testimony.

MR. JIM ELKINS, representing the Ketchikan Gateway Borough, said all eleven communities mentioned in SB 231 see the legislation as an economic stimulus package that will have a positive long range impact.

MS. JODY SIMPSON, a member of the Matanuska-Susitna Borough Assembly, stated support for the regional approach to prison expansion in SB 231. The Assembly believes it meets the needs of the various communities across the state. SB 231 will bring prisoners closer to home, their families, support networks and cultures, thereby increasing the probability of successful rehabilitation. The Assembly believes the economic impact associated with expanded facilities should be shared statewide and that Alaskans and contractors should be the ones to benefit from the \$20 million currently spent in Arizona each year. The Assembly also believes the facility expansion should be publicly operated and managed. The Assembly suggests, if a private prison is considered, that an open, competitive process should be used to select the private operator.

MR. JOHN MAPES, representing himself, stated support of SB 231 as it will put inmates in Alaska near their homes, families and support groups and it will save money by having inmates near medical personnel in programs already at the facilities. It will also save money on transportation costs.

MR. T.C. KAMAI, Kodiak Chief of Police, said that the Kodiak jail is one of the oldest operating jails in the state at 60 years old. It is also one of the busiest contract jails and often operates at full capacity. The City of Kodiak is committed to working with the State of Alaska to replace and expand the Kodiak Community Jail because it believes it is of vital importance to the community, region and the State of Alaska. The City believes

that replacement and expansion of the jail is essential to mitigating the liability that the City of Kodiak is burdened with under the current terms of its contract with the state. Despite efforts of jail staff to operate the jail in a professional manner, it finds the burden increasingly difficult to justify as the facility continues to age and liability increases daily. SB 231 will allow municipalities to bond for construction of correctional facilities. The Kodiak City Council passed a resolution in support of SB 231 in March of 2002. He urged committee members to support SB 231.

MS. NANCY WEBB, testifying from Fairbanks, noted the Fairbanks Borough Assembly unanimously supported a resolution endorsing facility expansion at the Fairbanks Correctional Center. The Assembly supports an expansion of 100 beds to revitalize the building. The existing facility needs a new kitchen facility to adequately serve the inmates there. The Fairbanks Correctional Center is just a jail holding facility at this time with inadequate space to house inmates.

MR. JERRY BURNETT, staff to Senator Lyda Green, sponsor of SB 231, explained the two changes made to the proposed committee substitute (Version P).

- On line 8, the phrase "not later than July 1, 2006" was added.
- On page 2, in subsection (b)(1), the three percent inflation factor was removed and replaced by "adjusted for inflation each year at a rate equal to the percentage increase in the Consumer Price Index for urban wage earners and clerical workers for Anchorage, Alaska, during the previous calendar year..."

MR. BURNETT noted the Consumer Price Index rate has been lower than three percent for the past several years. That change was designed to address the concern raised by Senator Therriault.

SENATOR THERRIAULT said the change satisfies his concern. He was not sure why the original inflation factor was set at three percent and why the authorization would be on the books forever. He asked if the new cut-off date will accommodate the problem with the Spring Creek facility.

MR. BURNETT stated, "The Spring Creek - they had a concern about doing refinancing prior to 2006 although I understand there's a possibility that they could do it sooner, according to Deven Mitchell."

SENATOR THERRIAULT moved to adopt Version P as the working document before the committee.

VICE-CHAIR DONLEY announced that without objection, Version P was adopted. He then noted there was no more public testimony and that he would like to hold the bill until Senator Taylor returns.

SENATOR ELLIS asked if Senator Taylor requested that the bill be held in committee.

VICE-CHAIR DONLEY said he did not.

SENATOR ELLIS asked what the additional concerns are with SB 231.

VICE-CHAIR DONLEY said the cost is still a major concern.

SENATOR ELLIS said, "It sounds like a Finance issue to me."

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VICE-CHAIR DONLEY said he would take up HB 375 at this time.

#HB375

HB 375-REVISOR'S BILL

MS. PAM FINLEY, revisor of statutes, informed members that this bill was drafted pursuant to statute and was introduced by the Legislative Council. The purpose of the legislation is to clean up errors in the statutes or provisions that have become obsolete. She said when drafting this bill, she tries to avoid any policy choices in the bill because the revisor's bill does not usually get the kind of attention that most bills do.

MS. FINLEY said HB 375 contains two sections of interest, the first being Section 1. Currently, the statutes say that when a bill has a specific effective date, the bill goes into effect that day. Unfortunately, sometimes the Governor does not sign the legislation until after the effective date. The practice in the revisor's office has been to treat the date signed as an immediate effective date because that is the date closest to the legislature's intent. Last year, legislation that lowered the blood alcohol content to .08 passed with a July 1 effective date. The Governor did not sign the bill until July 3, so it went into effect July 4. In the meantime, someone was arrested on July 1 and is claiming the sections that had a July 1 effective date should have a "90 days out" effective date. She noted the judge will decide on that matter and HB 375 is not intended to affect the lawsuit, but the matter did bring to her attention the fact that the statutes have not been reflecting actual practice.

Therefore, Section 1 reflects actual practice since at least 1984.

SENATOR THERRIAULT asked if the legal argument is that because the law could not take effect on the stated date, the standard 90 day effective date provision would apply.

MS. FINLEY said she assumes that is the legal argument. She then explained the second bill section that is of interest is Section 2. She said it appears to change the statute of limitations but does not. She explained that a floor amendment was passed last year. Prior to that amendment, the civil statute of limitations for sexual assault and sexual abuse was three years. The regular statute of limitations for torts was two years. Because of the rule about minors, if the sexual abuse occurred when the person was a minor, the three-year limit did not start running until the victim turned 18. Furthermore, if a person was sexually assaulted a certain number of times before the age of 16, the statute of limitations of three years did not start running until the plaintiff discovered the crime. The purpose of that exception is to allow for suppressed memories of children. The floor amendment repealed and re-enacted the special three-year statute of limitations to get rid of any civil statute of limitations for sexual abuse or assault that was a felony, however it did not deal with the misdemeanors. Therefore, since the misdemeanors no longer have the special three-year statute of limitations, they fall under the two-year statute of limitations for torts in general. The result is that Alaska now has a two-year statute of limitations for a sexual assault misdemeanor for civil cases. The other parts of that in other sections that deal with misdemeanors were written with the assumption that Alaska still had a three-year statute of limitations.

MS. FINLEY explained that Section 2 amends the exceptions for minors regarding the statute of limitations. Subsection (b) on the top of page 2 references the fact that no statute of limitations applies to felony sexual assaults and it lowers the statute of limitations for the other offenses to two years. She noted the old law defined what is meant by "sexual assault" and "sexual abuse" by a reference to the criminal statutes. The new law doesn't define it. She suggested this may be an issue the legislature may want to revisit. She said those two sections are the only two of interest.

VICE-CHAIR DONLEY noted the bill has a zero fiscal note and no further committee referrals. He said it appears the only problematic section is Section 2 and it makes the statutes consistent with a floor amendment. He noted he is not sure that

he agrees with the floor amendment and asked the will of the committee.

SENATOR THERRIAULT said he usually likes to have the opportunity to review the revisor's bill since it contains such a "scattering" of things and he has not done that.

VICE-CHAIR DONLEY announced that HB 375 would be held in committee until Wednesday.

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The committee took up SB 159.

#SB159

SB 159-APPEALS COURT JUDGES RETENTION

VICE-CHAIR DONLEY said he intends to take public testimony on SB 159 today but not to move it from committee today.

MR. LARRY COHN, Executive Director of the Alaska Judicial Council, gave the following testimony.

Mr. Chairman, I don't think that the shorter retention term that this bill proposes for Court of Appeals judges provides enhanced accountability without some risk of compromising the judicial independence of the Court of Appeals. I believe that our current evaluation process in Alaska is very effective as a means of ensuring judicial accountability and I would say, Mr. Chairman, that [indisc.] of the contents of the evaluation that the Judicial Council does for retention purposes, a more compelling argument might be made that shorter retention terms are necessary to ensure judicial accountability. As you know, the Judicial Council undergoes a very comprehensive evaluation for retention purposes. We survey approximately 10,000 Alaskans, including attorneys, jurors, police and probation officers, social workers, court employees and independent court watchers. We also solicit all forms of public comment, we look at judicial appellate rates, peremptory challenges, conflicts of interest and other aspects of performance and then we publish that information for the public's benefit.

And as I mentioned in my previous testimony, Mr. Chairman, in 1999 the American Adjudicators Society published a study that reviewed 20 years of our efforts in evaluating judges and, in short, the study uncovered

evidence that Alaskan voters actually make use of the information that we conveyed to them about the judges. The judges both - in the retention election there was a strong correlation between that percentage and the judges' scores, according to our survey. The same study unveiled that voters when interviewed said that they make use of the information that the Council provides so we believe that our evaluation process is a major step toward holding judges accountable for their conduct and their performance. Our data also suggests that the system is working as intended. We ask the attorneys to rate our appellate judges as you know, and a study that we've done for [indisc.] show that from 1994 to 2000 the average rating for all appellate judges in every possible rating category that we ask about is excellent. Our appellate judges routinely receive higher ratings than our trial court judges. We also conduct a survey of court employees that measure somewhat different characteristics than do our surveys of attorneys and they reflect also excellent ratings for our appellate court judges. And ultimately, the referendum on judicial accountability in the last 22 years for court [indisc.] judges that [indisc.] and retained by voters.

I'd like to also briefly make an observation I made last time I testified, Mr. Chairman, that there sometimes is a publicly perceived need or you hear opinion expressed that we need to reign in our courts that are light on crime. The data that we compile reflects that the Court of Appeals is anything but light on crime. The appellate affirmance rate, for the Court of Appeals, which of course has just criminal jurisdiction, is in excess of 85 percent and, if anything, we understate that appellate affirmance rate because we include remands as part - as a reversal when, in fact, many of those cases are remanded ultimately as a result of re-conviction. And this average appellate affirmance rate of criminal cases compares favorably to the national average, which is in the vicinity of 79 percent. So, we think these statistics show that our court has not been easy on criminals and, more importantly or just as importantly, it's been very effective in unambiguously interpreting and communicating legal standards so that the Trial Courts can correctly and effectively implement the law. 20 years ago this was not the case. The criminal law in Alaska was largely unsettled. Today, principally

because of the Court of Appeals, the criminal law is well established, it's reflected in our high affirmance rate and our appellate affirmance rates, which exceed national standards, and a trend of improved appellate affirmance rates for trial judges having criminal cases.

Mr. Chairman, the last time we convened on this bill, you made the observation that, you know, many people feel that judges should not serve a term in excess of our President or legislators and I must confess that observation has a certain ringing appeal to it but I respectfully suggest that there's a reason for that and that is of course that in the representative branch of government, you and your colleagues have an obligation to effect the will of your constituents whereas our appellate judges are not - we don't want our appellate judges to be swayed by a public opinion or the will of their constituents. They're for the protection of certain principles, and I don't mean to infer, of course, that the legislative branch is unprincipled, but the judges of course have to preserve our principles in the area of criminal law and criminal procedure and there's a great need for stability in the area of the law.

Now if you have shorter retention terms, what you have is less certainty as to what the law is. It will increase litigation, you know, if a lawyer doesn't like the law or the state doesn't like - the defense lawyers [indisc.], the state doesn't like the law, they may feel that with different judges that they may get a different law so I suggest that you might see an increase in litigation if the term is reduced.

The jurisdiction of the Court of Appeals, being criminal law, is an area that is particularly susceptible to public sentiment and I think that a shorter retention term poses a risk that sentiment could interfere with judicial reasoning. As I observed last time, Mr. Chairman, there are practical considerations in that a shorter retention term is likely, if anything, to result in fewer applicants for this position. As I mentioned before, there are a lot of lawyers obviously that have criminal law experience, but there are few lawyers that are really suitably qualified to serve on the Court of Appeals. It's a court that requires more than just criminal law

experience but significant appellate experience or at least significant experience in research and writing in the area of criminal law. This is reflected in the fact that in the year since 1980 when the original judges were appointed, there have only been two vacancies for which there were a combined total of eight applicants. As I mentioned before, five of those applicants were judges, one was a former judge, and the remaining two were the heads of their respective appellate divisions in the public defender agency and for ASPA (ph). And so there are very few people that are really qualified to serve on the court and I'm afraid that shorter retention periods might discourage those few applicants who are qualified from applying.

As our fiscal note indicates, there [are] some additional financial costs associated with more frequent retention elections, albeit very small. And just one other thing, Mr. Chairman. There was another observation, I believe, that you made at the last hearing that it is quite apropos in many situations where you said, I believe, that it's not uncommon to hear agency heads testify against legislation that might propose some change in the status quo and I think that's an observation, of course, that's a good one. In our case I suggest to you it doesn't really apply because if anything the Judicial Council would have a vested interest in more frequent retention periods as it would make the Alaskan public more dependent on the work we do, if anything.

So, in sum, Mr. Chairman, I think the Court of Appeals judges are doing a good job. We need for that to continue. We need very qualified applicants. We need to maintain judicial independence in that area of the law that is so subject to public sentiment and we need stability. So, with all due respect, Mr. Chairman, I suggest that the proposed legislation is unnecessary and it might pose more risk than possible benefits. So thank you very much Mr. Chairman.

VICE-CHAIR DONLEY asked Mr. Christensen to testify.

MR. CHRIS CHRISTENSEN, Deputy Administrative Director of the Alaska Court System, said reducing the term of retention for Court of Appeals judges from eight to six years would have a very negative effect on the criminal justice system in Alaska. The Alaska Court System opposes the legislation. As noted by the previous speaker, unlike many states and the federal government,

Alaska has a rigorous merit based system for the selection of judges. The framers of the Constitution spent a great deal of time putting together Alaska's system of selecting and retaining judges. They wanted a system that provided for both independence and accountability and was as non-partisan as possible. In the federal system, judges had complete independence and very little accountability. They were political cronies of the President or supporters and they served for life. The framers looked at the system used by most states at that time and saw judges who were totally accountable but had very little independence because they ran in contested elections and knew that their decisions would be reduced to sound bytes and result in attack ads from well financed opponents. Alaska's framers fashioned a compromise modeled on the Missouri system. Judges are selected using a merit based system. Partisan politics are kept out of the process as much as is humanly possible and judges stand for retention on a regularly scheduled basis.

MR. CHRISTENSEN stated, "Mr. Chairman, in my view this has worked pretty darn well over the years." Alaska has no history of official corruption in its judiciary, like many states. Attorneys who have practiced in Alaska for many years will tell you that the quality of the bench today is substantially better than it's ever been. Alaska has attracted a lot of smart, hard working, well respected attorneys who are very committed to what they do and took a pay cut to serve on the court. Alaska's judges dispose of about 150,000 cases per year and in a typical year there may only be few decisions that he takes heat on every year. He reminded legislators that if the court issues 15 decisions each year that the legislature does not like, that amounts to 1/100 of 1 percent of the court's caseload. He stated it is unfortunate that this level of dissatisfaction has prompted proposals to change the very nature of the system.

MR. CHRISTENSEN informed members that Alaska has the most liberal Bill of Rights of any state, meaning the most protective of individual liberties. The framers of Alaska's Constitution called themselves Republicans and Democrats but most of them, in a very real sense, were Libertarians who wanted to keep government in its place. Alaska's Court of Appeals applies the most liberal bill of rights in the nation to the laws passed by the legislature, and it upholds convictions under those laws about 85 percent of the time, which is about the national average.

MR. CHRISTENSEN said when seeking independence, the framers of the Constitution believed it is the ability of a judge to interpret and apply the law to a case as freely as possible from external influences and pressures. That is what the Court of Appeals does now. SB 159 will reduce this ability to judge a case free of external pressure. Shorter intervals will make more likely that political campaigns will be waged against judges

because of a single unpopular decision. Longer intervals give passions time to cool and allow people to take a longer term perspective on a judge's job performance. If a judge publicly announced he was going to do a public opinion poll in a criminal case and base his decision on the results, the public would be outraged.

MR. CHRISTENSEN said, as far as how Alaska compares to other states, Alaska's retention term is eight years. 39 other states have courts of appeals. 18 of those have merit based systems and 21 have elections, either partisan or non-partisan contested elections. The average term for the merit based states is 7.9 years, almost identical to Alaska's 8 years. The average term for the non-merit based states is 7.8 years. The framers of the Constitution specifically discussed the length of term of the Supreme Court and decided that it should be average. Some members of the judiciary committee at the constitutional convention wanted lifetime appointments, some wanted 12-year terms. They decided on 10 years because that was the national average.

MR. CHRISTENSEN said that litigants should have confidence that their cases should be heard on merits, not on public or political pressure that can be brought to bear on a judge. The law commands allegiance only when the law commands respect, which requires that the public believe that judges are neutral. Judicial independence is not about the protection of judges, it is about the protection of the public.

MR. CHRISTENSEN noted that last year there were over 100,000 cases that fell within the jurisdiction of the Court of Appeals, felonies, misdemeanors, infractions, municipal ordinance violations. Anyone can end up in court because of a brief lapse in judgment or because of carelessness. Criminal convictions can have serious consequences: loss of one's reputation, job, savings, relationships, and freedom. He asked legislators to consider the following question: if one day a criminal court judge was making an important decision about one of their lives, would they want the judge to base his decision on his best interpretation of the law or would they want the judge to look over his shoulder, sniff the political wind, and take into account the personal consequences that would face him if he ruled a certain way?

VICE-CHAIR DONLEY thanked Mr. Christensen and noted no one else wished to testify on SB 159. He announced he would hold the bill in committee and adjourned the meeting at 3:15 p.m.

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