ALASKA STATE LEGISLATURE
**SENATE STATE AFFAIRS COMMITTEE**
April 4, 2002
3:55 p.m.

**MEMBERS PRESENT**

Senator Gene Therriault, Chair
Senator Randy Phillips, Vice Chair
Senator Rick Halford
Senator Bettye Davis

**MEMBERS ABSENT**

Senator Ben Stevens

**COMMITTEE CALENDAR**

SENATE BILL NO. 159
"An Act relating to retention elections for judges of the court of appeals."
MOVED CSSB 159(STA) OUT OF COMMITTEE

SENATE JOINT RESOLUTION NO. 43
Requesting the United States Congress to grant a two-year moratorium on requirements for certain state payments under federal programs.
MOVED CSSJR 43(STA) OUT OF COMMITTEE

**PREVIOUS COMMITTEE ACTION**

SB 159 - See State Affairs minutes dated 5/05/01.
SJR 43 – No previous action to record.

**WITNESS REGISTER**

Senator Dave Donley
Alaska State Capitol, Room 506
Juneau, AK 99801-1182
**POSITION STATEMENT:** Sponsor of SB 159 and introduced SJR 43

Larry Cohn
Executive Director
Alaska Judicial Council
1029 W. Third Ave Suite 201
Anchorage, AK 99501-1981
**POSITION STATEMENT:** Testified on SB 159

Ray Brown
AK Academy of Trial Lawyers
510 L Street # 603
Anchorage, AK 99501
**POSITION STATEMENT:** Testified on SB 159

Chris Christensen
Deputy Administrative Director
Alaska Court System
820 W. 4th Ave
Anchorage, AK 99501-2005
**POSITION STATEMENT:** Testified on SB 159

**ACTION NARRATIVE**

**TAPE 02-02-18, SIDE A**

**CHAIRMAN GENE THERRIAULT** called the Senate State Affairs Committee meeting to order at 3:55 p.m. Present were Senators Phillips, Halford and Chairman Therriault. Senator Davis arrived momentarily.

#SB 159

**SB 159-APPEALS COURT JUDGES RETENTION**

CHAIRMAN THERRIAULT reminded committee members that the bill was initially heard during the 2001 session. He called attention to the committee substitute (CS) in members' packets.

SENATOR DAVE DONLEY said he supported the proposed CS. It changed the original legislation from four year terms to six year terms, which is consistent with the data they collected during the interim.

CHAIRMAN THERRIAULT said previous testimony showed a difference in interpretation of the data presented last session and he told the court representative, Mr. Christensen, they want to review the difference in opinion on how Alaska judicial terms compare to those of other states. He asked Senator Donley whether he had read the letter from the court system dated March 28, 2002.

SENATOR DONLEY replied he had not read the letter.

CHAIRMAN THERRIAULT announced they would take testimony while

Senator Donley read the letter.

MR. LARRY COHN, Executive Director of the Alaska Judicial Council, testified via teleconference. He said he hadn't seen the CS, but he understood it proposes a six-year term of retention versus the original four-year term. He said his remarks were applicable to the CS as well.

The Judicial Council evaluates judges standing for retention and they also conduct interim evaluations of judges two years prior to the retention elections. Their system of performance evaluation is used throughout the country and their review process surveys about 10,000 Alaskans including attorneys, jurors, police, probation officers, social workers, court employees and independent court watchers. They also solicit public comments and conduct public hearings. They look at all aspects of judicial performance then disseminate that information in the election pamphlet that is distributed to every Alaskan household, on the Internet and other more traditional forms of media.

In 1999 the American Judicature Society published a study that reviewed 20 years of the council's efforts to provide the Alaska public with information upon which they could make informed decisions. The study made it clear that voters use the information provided by the Judicial Council. It compared each judge's performance rating with his or her proportional numbers of do retain votes and found there was a statistically significant correlation. Nearly 80 percent of voters interviewed in their 1996 exit poll believed that the availability of the council's evaluation information helped to make Alaskan judges more accountable.

The evaluation process in Alaska is a very effective means of ensuring judicial accountability. It is working as intended with the current eight year appellate court retention period. For the years 1984-2000, attorneys gave appellate court judges an average rating of excellent for legal ability, impartiality, integrity, temperament, diligence, and overall performance. In the 2000 retention election, appellate court judges again received the highest overall rating of excellent from court employees.

Largely because of the work of the court of appeals, criminal law is now well established in Alaska as reflected in the high appellate affirmance rates of trial judges, which compare favorably to national standards and a trend of improved appellate affirmance rates for trial court judges in criminal cases. Criminal law, which is the jurisdiction of the appellate court,

is particularly susceptible to public sentiment. More frequent retention elections could mean more susceptibility to public sentiment to the detriment of the standards established by the Appellate Court and the measure of the criminal justice system.

The jurisdiction of the court of appeals already limits the number of qualified applicants and a shorter retention term could well reduce interest in applying for those positions. This is the court of last resort in over 95 percent of criminal cases because the Supreme Court grants few hearing petitions.

He noted the fiscal note was based on the four year retention so passage of the CS would require a small adjustment.

The proposed legislation is not necessary and there is the potential that it would cause more risk to the criminal justice system than benefits.

There were no questions for Mr. Cohn.

MR. RAY BROWN, the Alaska Academy of Trial Lawyers representative, testified via teleconference against passage of SB 159. He said there has never been a sitting Alaskan appellate judge that has not been retained. This is a very conservative judiciary that is narrow in interpretation of state and federal constitutional law and that has a high degree of affirming the trial court level decisions.

Although he spent many years as a criminal defense lawyer, he does almost no criminal law now so passage of the legislation will have little impact on him. Defendants whose convictions are affirmed and a small group of criminal defense attorneys who don't like the decisions the court rendered are the most frequent critics of this court. The three appellate court judges are well thought of and very well qualified.

His primary concern is stare decisis or continuity of decision because there must be some predictability in terms of litigating cases as a criminal defense lawyer or a prosecutor. The court of appeals decides some very important constitutional issues when interpreting state and federal law. Among those primarily involved are the Fourth, Fifth, Sixth and Eighth Amendments to the U.S. Constitution and the state counterparts. The Fourth Amendment deals with search and seizure, the Fifth Amendment with due process and the right to remain silent, the Sixth Amendment is the right to counsel and the Eighth Amendment is the right to bail. Continuity in the Fourth and Fifth Amendment cases is particularly important and the longevity of court of appeals

judges and the longevity of their decisions are paramount for attorneys practicing before the trial courts and law enforcement officers.

He didn't understand why Senator Donley introduced the legislation; nothing needs to be fixed because nothing is broken. The system has worked well.

CHAIRMAN THERRIAULT asked Senator Donley if he wanted to comment on the letter from the Alaska Court System or did he prefer that Mr. Christensen testify first.

SENATOR DONLEY wanted Mr. Christensen to testify first.

MR. CHRIS CHRISTENSEN, Deputy Administrative Director of the Alaska Court System, explained that Alaska has a rigorous merit based system for the selection of judges. The Constitution framers fashioned a system that provided independence and accountability while being as non-partisan as possible and required judges to stand for retention on a regular basis.

The system has worked well over the years and there is no history of official corruption. They have attracted many smart and hard working attorneys who are very committed to their work. They dispose of over 150,000 cases every year and in a typical year three or fewer of those cases cause any controversy. He asked the Chairman to consider the fact that if he didn't like 15 decisions made in any one year, that would represent one one-hundredth of a percent of their total caseload. It's unfortunate that that level of satisfaction has prompted proposals in recent years to change this system.

Judicial independence is the ability to judge a case and to interpret and apply the law as free as possible from external influences and pressures. That is what the court of appeals does now and SB 159 is intended to reduce that ability by making judges face voters at shorter intervals. Shorter intervals make it more likely that political campaigns would be waged against judges because of a single unpopular decision. Longer terms would give voters a longer term perspective on a judge's job performance.

If a judge publicly announced that he was going to do a public opinion poll in a case and base his decision on the results, people would probably be outraged. However, he thought that is fundamentally what this bill is about. The bill sponsor has suggested that the retention term of Alaskan appellate court judges is longer than the national average. Last year they

pointed out that the data submitted by the sponsor was flawed in a variety of ways. At the committee's request he reviewed the data a second time and got the latest data from the National Center of State Courts and the American Judicature Society. That data agreed with the data submitted by the sponsor in about three quarters of the cases. When it didn't agree he went to a court system's web site or a state's constitution or statutes to determine who was correct. While the sponsor's staff found 32 states with a court of appeals, there are, in fact, 39. Eighteen of those states have a merit-based system while 21 have a non-merit based system. The latter are either contested elections or direct appointment by either a governor or a legislature. Alaska's eight-year term is almost exactly average. The average for the merit-based states is 7.9 years and the average for the non-merit based states is 7.8 years. If the basis for the proposed legislation is that Alaska's court has a longer term than average then it's not an accurate statement.

Every litigant should have confidence that his or her case will be heard on the merits and not on the basis of public or political pressure. Law commands allegiance only if law commands respect. It can only command respect if the public believes judges are neutral when they are deciding criminal cases. Ultimately, judicial independence is not for the benefit of the judge, it is for the benefit of the public.

Last year there were over 100,000 cases that were within the appellate court jurisdiction. A relatively small number were felonies, most were misdemeanors and violations of ordinances. Anyone who has ever been careless or exhibited a lapse in judgment could end up in criminal court. Criminal convictions have very real consequences and can result in the loss of reputation, loss of a job, loss of freedom or loss of savings. With this in mind, ask yourself whether you would want a criminal court judge to make an important decision about your life to base that decision on his best interpretation of the law or on the political and personal consequences that face him if he issues an unpopular decision.

SENATOR PHILLIPS didn't think the founding fathers foresaw having an appellate court when the Constitution was established in 1958.

MR. CHRISTENSEN explained the founding fathers created the superior court and the supreme court. They created a retention term of six years for the superior court and ten years for the Supreme Court. In the Constitution, they stated that the Legislature could create additional courts because they knew there would be the need to create additional courts. The

Legislature quickly created a district court and then waited 20 years to create a court of appeals. When the Legislature did that, it gave that court a retention term that fit within the scheme that already existed, ten years for the supreme court, eight years for the court of appeals, six years for the superior court and four years for the district court. The appellate court has a longer retention period because judicial independence is more important at that level. The Legislature decided on the eight-year term for the court of appeals because that was the national average.

SENATOR PHILLIPS averaged the retention terms for merit and non-merit western states at six and one-half years. He said he related to the west coast more than the east coast.

MR. CHRISTENSEN replied the bill sponsor said the national average was appropriate and he was simply pointing out that while the national average is appropriate, it's not what the sponsor thought it was. He noted that many of the western states use partisan elections, which is a system he doesn't believe should be held as a model.

Another point he thought should be noted that was not reflected in the statistics is that not only is Alaska's retention term at the national average of eight years but it also has a two tier process. When first appointed, a judge stands for initial retention at the first election held more than three years after assuming office. Most states don't have this two-tier term. Generally, a judge serves the same amount of time in the first term as in all subsequent terms. For most of the states with a shorter term than Alaska, that is their first term not the initial term, which makes their term longer that Alaska's.

SENATOR HALFORD asked how many states have appointment by the Governor with discretion between a list of people and with no confirmation by either body of the Legislature or any other entity.

MR. CHRISTENSEN didn't know the exact answer but did know there are 18 states that have some type of merit selection system. In all of those it is appointment by the Governor. The data provided by Senator Donley's staff lists two court of appeals that are in states that have legislative confirmation of a merit appointment, but he didn't know whether that was accurate.

CHAIRMAN THERRIAULT asked about the corrections Mr. Christensen made to the sponsor's data.

MR. CHRISTENSEN said he made corrections to the data that made his point as well as corrections that worked to the sponsor's advantage.

SENATOR DONLEY stated he believes the combination of the term of office plus the lack of accountability that comes from neither confirmation nor direct election makes the eight-year term for the appellate court excessive. He thought six years was reasonable. He said he feels very confident that if the average Alaskan citizen were asked, they would like the opportunity to vote on judges more frequently so they are more accountable to the election process.

He restated his concern regarding the combination of length of time and type of retention system. The data provided for the initial hearing dealt with the merit states and didn't look at the numbers in the other states. When you look at it from the point of view of time in office and over all accountability, he thought the weight of evidence is persuasive that a six-year term is appropriate when there is no confirmation process or an election process. He accepted the new data but didn't think that it led to the same conclusion that the court system announced and he didn't think it refuted his concern about the combination of the two points.

CHAIRMAN THERRIAULT called for questions from committee members.

SENATOR DAVIS asked for the basis for his belief that the public would like to see this change. She said she hasn't received any letters that reflect dissatisfaction with the current system or the retention terms and she saw no letters to that effect in the bill packet. The information she read indicated this is what he believes and not necessarily what the public might want.

SENATOR DONLEY said he could try to find the resources to conduct a public opinion poll but he feels confident from his discussions the public would like the opportunity to vote. He compared it to the elected attorney general issue and said a majority of Alaskans have repeatedly said they want the opportunity to elect their attorney general; they like to have elected officials. He said Alaska has the fewest elected officials of any state in the union. Citizens in every other state but one have the opportunity to elect more of their public officials. Public opinion polls in Alaska indicated voters like the opportunity to elect their officials and he though they would like to do so more frequently in this case. He thought he could find some polling data to support his opinion.

SENATOR DAVIS replied that might be the case, but bill sponsors usually present lists of people that support their legislation and she sees none of that for this bill. With regard to his statement that the public often says they would like to elect their officials, she said she has been in the state long enough to know that if the public wanted to do that then that's the way it would be done. She knows there are people that support the sponsor's view on the issue, but she doesn't know that the masses support his view.

SENATOR DONLEY said if that were true then the attorney general would now be elected. He thought that every public opinion poll shows very strong support for an elected attorney general in Alaska. This hasn't happened because it's hard to get change in the system. Even if a majority of the people support a particular thing, the system is designed to require a super majority to get major or systemic changes accomplished.

SENATOR DAVIS said perhaps she should have stated it differently because she hasn't heard the public discuss the topic or heard that they are calling Legislators and trying to get the issue on the ballot. She said it hasn't happened in the thirty years she has been in Alaska.

SENATOR DONLEY replied, "…it tends to be the people who have an interest in the system who are rating the system and not just the average citizen." Having attorneys rate judges isn't the most objective and accurate means of the rating because it's very hard to criticize our judiciary. "I have people talk to me quite frequently that really want to remain anonymous because they don't want retribution… They're willing to come to me and tell me things but when I ask them to come forward and talk about it they say, 'No, I don't want some judge mad at me.' They're scared of that. I make my living practicing law; you think I want to make judges mad at me? Of course not, I just really believe the public deserves an opportunity to have some accountability at a higher degree than this state currently presents for our judiciary."

SENATOR DAVIS asked for the makeup of the Alaska Judicial Council and whether it was comprised of a majority of attorneys.

MR. COHN replied it has three attorneys, three non-attorneys and the Chief Justice of the Supreme Court who sits as chairman and ex officio. He only votes in the case of a tie when the council must make a decision.

SENATOR PHILLIPS asked whether the Chief Justice is an attorney.

MR. COHN replied he is an attorney.

SENATOR PHILLIPS said that means there are four attorneys and three non-attorneys on the council.

CHAIRMAN THERRIAULT asked if he heard correctly that adoption of the CS would increase the fiscal note.

MR. COHN replied the CS would reduce the size of the fiscal note and he could submit a revised fiscal note to show the impact of the CS.

CHAIRMAN THERRIAULT announced there was the prepared State Affairs CS and he had no amendments to that CS. He asked whether there were any amendments from committee members.

SENATOR DAVIS said she did not have an amendment but she would like to see a copy of the fiscal note.

CHAIRMAN THERRIAULT asked for the will of the committee.

SENATOR PHILLIPS made a motion to move CSSB 159(STA) and accompanying fiscal note from committee.

CHAIRMAN THERRIAULT said there should be a notation that the fiscal note will be adjusted to reflect the change.

SENATOR DAVIS objected to the motion.

CHAIRMAN THERRIAULT asked Senator Davis whether she wanted to speak to her objection.

SENATOR DAVIS said she believed the sponsor was very sincere about what he thought needed to be done. However, she did not see the need for the change and didn't believe the balance should be upset without more input. The information the sponsor presented didn't convince her that it was the right thing to do. Perhaps she could support the issue at a later time but she didn't have enough to convince her that the status quo wasn't working because she hasn't heard expressions of dissatisfaction and the retention terms in Alaska aren't that different from those of many other states. The current balance could be upset if judges had to stand for retention election more frequently. Sometimes having individuals in public office for longer periods of time is helpful because they grow as they serve.

CHAIRMAN THERRIAULT called for a roll call on the motion to move the bill from committee with individual recommendations.

Senator Phillips, Senator Halford and Chairman Therriault voted yea and Senator Davis voted nay.

CSSB 159(STA) moved from committee with individual recommendations. A revised fiscal note would be provided to the next committee of referral.
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SIDE B
4:45
#SJR 43

**SJR 43-MAINTENANCE OF EFFORT ON FEDERAL PROGRAMS**

SENATOR DONLEY explained a maintenance of effort requirement is a condition that comes with some federal funding programs and says that if a state were to reduce spending on a particular program then there may be a reduction in the amount of federal funds received. The maintenance of effort requirements are not all the same, which state budgets that are heavily dependent on those federal funds.

It is challenging for states to do their best based on the highest and best need in any given year because even though a state wanted to prioritize a different level of funding in a different program, the maintenance of effort requirements may inhibit that because of the potential loss of federal funding. This entices the state to continue funding at a level that may not be the most appropriate level in that particular year.

The resolution requests the United States Congress to grant a two-year moratorium on the maintenance of effort requirements for those states receiving federal funds. States could therefore adjust their budgets without being fearful of losing federal funds.

CHAIRMAN THERRIAULT asked Senator Donley whether he thought copies should be sent to every state governor or to the heads of the legislature in every state to alert them and try to build nation wide support.

SENATOR DONLEY thought copies should be sent to the legislative leadership since they would be the ones to adopt similar legislation if they thought it meritorious. He also thought informing the National Conference of State Legislators (NCSL) and other national organizations of legislatures would be a good idea.

CHAIRMAN THERRIAULT asked him to verify that this would give states a period of time in which they could adjust their spending to suit their particular situation after which they could establish a new level for maintenance of effort.

SENATOR DONLEY replied that was the idea.

SENATOR PHILLIPS asked Chairman Therriault whether he wanted a conceptual amendment.

CHAIRMAN THERRIAULT replied he did.

SENATOR PHILLIPS made a motion to adopt a conceptual amendment to send the resolution to the presiding officers of each of the 49 states.

CHAIRMAN THERRIAULT said generic language would be used so each recipient wouldn't necessarily be named.

There being no objection, Amendment #1 was adopted.

SENATOR PHILLIPS asked whether he wanted to include NCSL.

CHAIRMAN THERRIAULT thought it might be best to send them an explanatory letter from the Finance Committee with the resolution attached.

SENATOR DONLEY said that was acceptable to him.

SENATOR PHILLIPS made a motion to move CSSJR 43 and attached fiscal note from committee with individual recommendations.

There being no objection, CSSJR 43(STA) moved from committee.
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ADJOURNMENT

There being no further business before the committee, the Senate State Affairs Committee meeting was adjourned at 4:55 p.m.