

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

March 5, 2014

1:08 p.m.

MEMBERS PRESENT

Representative Wes Keller, Chair
Representative Bob Lynn, Vice Chair
Representative Neal Foster
Representative Gabrielle LeDoux
Representative Charisse Millett
Representative Max Gruenberg

MEMBERS ABSENT

Representative Lance Pruitt

COMMITTEE CALENDAR

HOUSE JOINT RESOLUTION NO. 33

Proposing amendments to the Constitution of the State of Alaska to increase the number of members on the judicial council and relating to the initial terms of new members appointed to the judicial council.

- HEARD & HELD

HOUSE BILL NO. 255

"An Act relating to unmanned aircraft systems; and relating to images captured by an unmanned aircraft system."

- SCHEDULED BUT NOT HEARD

PREVIOUS COMMITTEE ACTION

BILL: HJR 33

SHORT TITLE: CONST. AM: MEMBERSHIP OF JUDICIAL COUNCIL

SPONSOR(s): JUDICIARY

02/28/14	(H)	READ THE FIRST TIME - REFERRALS
02/28/14	(H)	JUD, FIN
03/05/14	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

ERNEST PRAX, Staff

Representative Wes Keller
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Speaking as staff to the House Judiciary Standing Committee, which Representative Keller chairs, explained the differences between the original resolution and the proposed resolution.

DAVE PARKER
Wasilla, Alaska

POSITION STATEMENT: Testified in favor of HJR 33.

ADAM TROMBLEY
Anchorage, Alaska

POSITION STATEMENT: Testified in support of HJR 33.

WILLIAM F. CLARKE
Chugiak, Alaska

POSITION STATEMENT: Testified in support of HJR 33, particularly increased geographical representation.

LOREN LEMAN
Anchorage, Alaska

POSITION STATEMENT: Speaking as a former House and Senate legislator and former Lieutenant Governor testified in support of HJR 33.

DAVID LANDRY
Anchorage, Alaska

POSITION STATEMENT: Speaking as a general contractor, opposed HJR 33.

DAVE JENSEN
Anchorage, Alaska

POSITION STATEMENT: Speaking as a 40-plus year business executive, opposed HJR 33.

GEORGE PIERCE
Kasilof, Alaska

POSITION STATEMENT: Testified regarding his opposition to HJR 33.

NICOLE BORROMEO
Alaska Federation of Natives (AFN)
Anchorage, Alaska

POSITION STATEMENT: Testified regarding AFN's concerns with HJR 33.

BENJAMIN MALLOT

Alaska Federation of Natives (AFN)
Anchorage, Alaska

POSITION STATEMENT: Concurred with Ms. Borrromeo's points regarding HJR 33.

BYRON CHARLES

Ketchikan, Alaska

POSITION STATEMENT: Testified regarding HJR 33.

WALTER L. CARPENETI

Juneau, Alaska

POSITION STATEMENT: Speaking as an employee of the Alaska Court System for 30-plus years and as former Chief Justice of the Alaska Supreme Court, opposed HJR 33.

ACTION NARRATIVE

[1:08:20 PM](#)

CHAIR WES KELLER called the House Judiciary Standing Committee meeting to order at 1:08 p.m. Representatives Millett, Gruenberg, Foster, LeDoux, Lynn, and Keller were present at the call to order. Representative Pruitt arrived as the meeting was in progress.

HJR 33-CONST. AM: MEMBERSHIP OF JUDICIAL COUNCIL

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CHAIR KELLER announced that the first order of business would be HOUSE JOINT RESOLUTION NO. 33, Proposing amendments to the Constitution of the State of Alaska to increase the number of members on the judicial council and relating to the initial terms of new members appointed to the judicial council.

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ERNEST PRAX, Staff, Representative Wes Keller, Alaska State Legislature, advised that HJR 33 proposes to amend the [Alaska State Constitution] during the next general election by offering Alaskans the option to increase membership of the Alaska Judicial Council from the existing three non-attorney members to a total of six non-attorney members. He emphasized that HJR 33 is not intended disparage or attack the Alaska Judicial Council (AJC) or the Chief Justice of the Alaska Supreme Court, but

rather to improve the nomination and selection of judges and justices to better reflect Alaska in the 21st Century. The three purposes of HJR 33 are: (1) enhance the AJC's vetting process regarding nomination and retention recommendations for judges and justices; (2) enhance the AJC's credibility in the minds of the general public; and (3) protect the Chief Justice from partisan attack. Under the Alaska State Constitution and the AJC by-laws, the Chief Justice's vote is required to break a tie or when his/her vote could change the outcome of a particular vote being taken. Over the past two years certain votes by the Chief Justice have been placed under scrutiny, and thus Mr. Prax suggested that "regardless if there has been a problem there or not, let's act preemptively and help the Chief Justice out and reduce his likelihood of being subject to partisan attack for votes that they take."

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MR. PRAX then opined that the AJC's membership [currently] hampers its constitutional responsibility to properly represent Alaska's diverse geographic and cultural makeup as outlined in Article 4 of the Alaska State Constitution. He paraphrased the Alaska State Constitution, Article 4. House Bill 33's proposal to increase Alaska Judicial Council's non-attorney membership to six members would allow the state to meet its constitutional mandate and acknowledge that Alaskans are more connected in terms of travel and enhanced information than in the 1960s. With regard to the appearance of a conflict of interest in the minds of the public when the Chief Justice is required to cast a tie-breaking vote, Mr. Prax pointed out that the Chief Justice possesses the final determination in a candidate's name moving forward or not forwarding it to the governor; the candidate may directly or indirectly work with the Chief Justice in the future. "There have been votes that reflect this occurring and there has been concerns," he stated. Mr. Prax then turned to the issue of an imbalance of proportional representation in which the attorney members outnumber the non-attorney members. Mr. Prax related his understanding from a discussion regarding [SJR 21], wherein there was said to be approximately 4,200 members of the Alaska Bar Association with approximately 3,000 members active. If the approximate number of Alaskans, 735,000, was divided by the members of the Alaska Bar Association, the members of the Alaska Bar Association represent approximately 0.5 percent of the state's population, yet they make up 57 percent of AJC's voting power. In contrast, the non-attorney population represent the remaining approximate 99 percent of Alaska's population has 43 percent of the voting power within

AJC. Therefore, HJR 33 seeks to restore balance and offer non-attorneys a greater voice in vetting candidates for judges and justices. Mr. Prax submitted that HJR 33's proposals are not hard and fast solutions, but are before the committee for discussion.

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MR. PRAX directed attention to proposed CSHJR 33, Version 28-LS1509\U, Wallace, 3/3/14, in committee members' packets. He explained that Version U embodies changes in HJR 33 such that all of the AJC's attorney and non-attorney members must be confirmed by the legislature. He further explained that the current voting policy will be such that the AJC acts by a concurrence of five or more members and according to the rules which it adopts, he explained.

CHAIR KELLER opened public testimony.

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DAVE PARKER, speaking as a citizen of Wasilla with a background in law enforcement, informed the committee that in March 2013, he began his term as a non-attorney member on the Alaska Judicial Council. He then offered three reasons he supports HJR 33. First, HJR 33 would bring more accountability to the AJC as it would connect to more citizens of Alaska. He opined that the judicial council is solely accountable to the people of Alaska and increasing the number of non-attorney members offers better representation of the populace and opens the door to additional diversity, input, and accountability. Second, he said he believes HJR 33 will provide more balance to the judicial selection process and review of sitting judges. He surmised that all of the AJC members appreciate the input of the Chief Justice and attorney members of the council as attorneys understand the finites and the vagaries of Alaska's judicial system better than other council members. However, he opined, the AJC is heavily weighted with four of seven votes being from Alaska Bar Association members; not confirmed by the legislature. There is additional influence from the Alaska Bar Association since the director of the AJC is a member of the Alaska Bar Association and the bar survey is a main source of information used to determine whether or not a candidate is chosen. The influence of the Alaska Bar Association, a specialized group, would be mitigated by HJR 33, which would bring the AJC closer to Alaskans. Third, a simple majority requirement strengthens each vote on the AJC, he noted, as it

currently requires four votes to forward a name. The four of six or seven votes provides more weight for a negative vote than a positive vote. Subsequent to vetting by the AJC, an AJC applicant receives final vetting from the governor. Mr. Parker submitted that HJR 33 will enable citizens more participation in the entire process.

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ADAM TROMBLEY advised that he supports HJR 33 for all of the reasons of the previous witness, including Mr. Prax. He advised he is a member of the Board of Governors of the Alaska Bar Association and supports the increase of non-attorney judicial council members. In response to Representative Gruenberg, Mr. Trombley said that he sits on the Anchorage Municipal Assembly.

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WILLIAM F. CLARKE noting he has lived in Alaska since 1978 informed the committee that his background is 20 years as a pilot in the U.S. Air Force with two combat tours in Vietnam. He further informed the committee that in 1984 he retired from the U.S. Air Force and until 2005 was employed with an engineering firm in Anchorage for 16 years, and until February 2013 was a [non-attorney] member of the AJC. He expressed his agreement with Mr. Parker and Mr. Prax as HJR 33 offers the council nine voting members, which helps to prevent tie votes. He submitted that the resolution doubles the number of public members "which is absolutely necessary," and attorney members stay at three "which is adequate." He expressed HJR 33 is not a criticism of attorney members who serve on the council as they are very professional, especially Kevin Fitzgerald and Julie Willoughby. He offered that HJR 33 would pass "comfortably" if put to a public vote. The public membership on the AJC needs to be increased in order to achieve geographical representation which HJR 33 will remedy by adding three non-attorney members. If the aforementioned seems inadequate, he suggested the possibility of increasing the number of non-attorney members to 11; keeping it at an odd number. He noted that although the current ratio with the bar and general public is approximately 1:180 and that couldn't be mimicked, the ratio should be respected by increasing the membership. With regard to comments that a split vote of 3:3 is "rare," Mr. Clarke disagreed, especially during the last two years when [Alaska] Supreme Court vacancies were considered. In fact, public members were overridden three times. Mr. Clarke recalled to two very good, highly qualified and unimpeachable judge applicants who were

trumped by a tie-breaker from the Chief Justice at the time. He noted that no reason was given for not choosing the applicants.

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REPRESENTATIVE GRUENBERG interjected a point of order and stated the Alaska Open Meetings Act exception provides that personnel matters are not discussed in open session as the merits of a charge cannot be determined. He requested that personalities be solely discussed in executive session or disregarded.

CHAIR KELLER instructed Mr. Clarke to take heed of Representative Gruenberg's comments and not discuss personalities.

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MR. CLARKE reiterated that he is in favor of HJR 33 as it offers better representation of the populous of Alaska and also increases the number of candidates presented to the governor for his/her final decision.

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REPRESENTATIVE GRUENBERG said he did not object to Mr. Clarke's general comment that more names should be presented to the governor, but advised that specifics in a given case should not be discussed in an open meeting.

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LOREN LEMAN, a former State of Alaska Representative, Senator and Lieutenant Governor, testified in support of HJR 33. Mr. Lemman said the Alaska State Constitution, although it's a good constitution, it's not perfect and has been amended 28 times, of which he was involved in four amendments. He noted agreement with the comment that amending the Alaska State Constitution should not be taken lightly. When legislators analyze and evaluate how well the Alaska State Constitution works or does not work, today's legislators enjoy the benefit of 55 years of hindsight. He opined that a better process for submitting names [to the governor] for judges and justices could exist because the current process is dominated by members of the Alaska Bar Association as they control four of the seven seats on the AJC.

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REPRESENTATIVE MILLETT recalled a comment that during the territorial days there were not many attorneys, which is one of the reasons the AJC was so small. She acknowledged that times have changed and the Alaska State Constitution may require updating in view of Alaska's current population base. She then offered that it is difficult to locate information regarding how the judges treat people before them and control their courtrooms and Alaskans seem to automatically vote yes on the question of whether to retain judges without any knowledge of what the judges do. A flaw, she identified is that a poll [by the Alaska Bar Association] is not performed on a sitting judge.

MR. LEMAN responded it is "good" when information is available and transparent so voters can make informed and form knowledgeable decisions. He agreed that the number of attorneys available to serve in the earliest days of statehood was small and estimated Alaska's population has multiplied approximately five-to-six times since the delegates met in 1955-1956. Therefore, today there are a lot more attorneys in Alaska as well as a lot more people.

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REPRESENTATIVE LEDOUX offered that she is not sure there is a need to change the makeup of the AJC and expressed interest in reviewing the recommendation process of the AJC which is not a constitutional mandate and was authority given by the legislature. She expressed concern that a governmental body recommends that an individual be retained or not retained. In the context of legislative campaigns, she stated she would feel uncomfortable if a quasi-official or official body ran ads that a certain representative should or should not be retained.

MR. LEMAN said he shares Representative LeDoux's concerns about retention recommendations and noted recent actions in which public monies were used to recommend retention or non-retention and which caused him great angst. He pointed out that many other boards and commissions in state government have more members than the AJC. The Alaska Bar Association Board of Governors has 12 members; the University of Alaska Board of Regents has 11 members; the Workers Compensation Board has 18 members; and the Alaska Commission for Judicial Conduct has 9 members. As an example, he explained that the Board of Registration for Architects, Engineers, and Land Surveyors members must be nominated by the governor and confirmed by the legislature. Although the professional society may play a role in suggesting names it has no authority to forward names and

certainly not without legislative confirmation. Effectively, the Alaska Judicial Council panel of seven members has three and occasionally four members with the power to determine the composition of one of Alaska's three branches of government, he opined. He further opined it is a mistake to put that much power in the hands of so few people, especially since three of the members chosen by the Alaska Bar Association are accountable exclusively to the Alaska Bar Association. The aforementioned he argued, creates a fundamental problem with accountability because those members are not selected by the governor nor are they required to stand for legislative confirmation as public members are required. He explained that in a representative democracy it is important a clear majority of council members are selected through a process more accountable to the people. Opponents to HJR 33 may testify that the system is fine and it has served Alaskans well for 55 years and "don't fix what isn't broken." While he acknowledged the process has allowed the selection of some very fine judges who have served with distinction, it has also prevented extraordinarily qualified people from being considered by the governor, which he opined is wrong. He further opined that all qualified names should be advanced, including those who may not share his judicial philosophy, but stated there are examples in which the AJC hasn't done that. He reiterated that effectively the Alaska Judicial Council selects judges, who sit on the Alaska Supreme Court.

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MR. LEMAN said he disagreed with former Chief MR. CARPENETI's testimony that HJR 33 would destroy the merit system, and maintained that HJR 33 continues the merit systems and allows Alaskans input through its public members. He addressed concerns that HJR 33 will inject politics into the selection system and contended that politics are already injected into the selection due to the monopolization by the Alaska Bar Association members. Balance is offered to [the Alaska Judicial Council] through HJR 33, he opined. The resolution offers greater opportunity for people from rural Alaska to serve. He then noted that an Alaska Native has never served on the AJC. Mr. Leman related his belief that Alaskans deserve the right to consider this important question at the next election and urged the House Judiciary Standing Committee's support for HJR 33.

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REPRESENTATIVE GRUENBERG speaking to Mr. Leman questioned whether there is a difference between how many people are on the AJC, what their views have been or are, and who appoints them. The resolution would place three additional people on the council, but they would all be appointed by the governor. Therefore the number of gubernatorial appointments on the Alaska Judicial Council would be doubled. He then questioned if there is the potential for misuse in authorizing that much power in the hands of only one person, the governor.

MR. LEMAN, noting that he does not know who will be future governors, said he would like to think of the Alaska State Constitution as being relatively timeless and that the changes the legislature makes ought to be appropriate over time. Furthermore, although the writers of the Alaska State Constitution created a constitution that vests a lot of power in the governor, that power is tempered by the pre-selection process of the AJC. The governor appoints members to the AJC and the legislature confirms them. Mr. Leman said he would not be opposed to legislative confirmation of judges.

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REPRESENTATIVE MILLETT pointed out that the U.S. President does not go through a judicial council as he/she appoints all of the U.S. Supreme Court Judges who are then confirmed by the U.S. Senate, which is an existing model of politicizing the selection of judges.

MR. LEMAN explained that Alaska does not have quite the same model in state government that is provided for in the U.S. Constitution. He related it would inappropriate if he said he wouldn't be opposed to confirmation by the Alaska Senate because Alaska has vested so many of its authorities and powers into both the House and Senate. Rather, he suggested, the legislature in joint session could [provide confirmation], which would counter the concern that one individual, the governor, has too much power.

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REPRESENTATIVE GRUENBERG noted that due to the U.S. model [U.S. Senate confirmation] many judges have not been able to be confirmed, and thus he didn't believe that to be a model to follow. He then turned attention to [HJR 18, which proposes to divest the governor of the ability and the legislature of the current method of [appointing] the attorney general. He pointed

out that [HJR 18] is directly counter to HJR 33 in that HJR 33 provides for more people to be appointed by the governor. Whereas [HJR 18] eliminates the governor's ability to appoint one individual for the position of attorney general, and proposes that the attorney general be elected.

MR. LEMAN responded that the selection of the attorney general is an example of the power the founding fathers gave to the governor; which illustrates that Alaska's founders intended a strong governor. He recalled that both former Territorial Governor and U.S. Senator Ernest Gruening and former Territorial Governor Mike Stepovich related angst with the lack of power in their position of territorial governors. He reiterated that the writers of the Alaska State Constitution stipulated a strong governor and intended decisions be made in Alaska by an individual who is accountable to the people.

2:08:00 PM

DAVID LANDRY, noting that although he is a general contractor in Anchorage, he is representing himself and related his opposition to HJR33. He opined that HJR 33 pointedly undervalues the professional knowledge that attorneys bring to the table during the process of selecting Alaskan judges. Furthermore, prior testimonies mischaracterize the nature of the Alaska Bar Association. In his profession, he related, when it is necessary to replace a subcontractor or vendor, his first order of business is to obtain his colleagues' opinions as to who does good work, shows up, and is honest. He emphasized that his professional colleagues are an important resource in his business. He expressed that the current makeup and balance of the AJC accesses knowledgeable professional experience in a similar manner. Although most cases before judges are fighting for opposite outcomes, the one thing the attorneys have in common and benefit from is a fair and competent judge. He said he found fault with the underlying characterization from previous testimony that allege the Alaska Bar Association is getting together to "pull one over on everybody else." He said he is relatively confident the members of the Alaska Bar Association do not have a prior to the AJC meeting to decide how the [attorney members] will vote. Moreover, three attorney members are also citizens of Alaska with their own political views; mischaracterizing the members of the Alaska Bar Association as another "species" voting on Alaska's judges is wrong as they have professional background knowledge and personal experience with the individuals applying to be judges. Although the testimony of Mr. Leman and Mr. Prax pitched the

idea that HJR 33 would be the people's voice in picking the judges, Mr. Landry opined the HJR 33 would substitute the governor's voice. He further opined that the current judicial makeup is a problem only for those interested in politicizing the judiciary, which he is not. A lot of people have spoken in the name of Alaskan citizens saying they want this, but Mr. Landry said, "I don't want this." He stated his intention is for judges to be chosen by merit, by individuals who have worked with the [candidates], know the law, and can help put forth fair, consistent, and good judges. He stated his opposition to political ideologues being put on the bench for that very reason.

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DAVE JENSEN paraphrased from the following written remarks [original punctuation provided]:

I am testifying in regard to SJR 21 [HJR 33]. I have been an executive in Alaska for 40 years, most of that time with private, for-profit corporations.

I am business executive with no connection to the legal system and no involvement with politics. It is from the viewpoint of a business executive that I offer my testimony regarding SJR 21 [HJR 33].

I think that SJR 21 [HJR 33] is a bad idea, and will be bad for private business in Alaska and here is why. As a business executive, I tried to keep the affairs of the companies that I ran out of court. But sometimes there was no alternative, and when that happened, all I expected was a judge who was impartial and professional.

I was not disappointed by the Alaska court system, because every time that I did have to go to court, I got a judge who was impartial and professional, with no private agendas or axes to grind. I did not agree with every decision made by every judge in every case I was involved in, but I always felt that the judge was impartial and professional.

It was always a comfort to me to know that the judges in Alaska get to be judges in part because they are well regarded by their fellow professionals. I would never go to a doctor unless I knew that he was well

regarded by his colleagues in the medical profession, and I feel the same way about lawyers and judges.

The practical effect of SJR 21 [HJR 33] will be to remove professional qualifications from the selection of judges and to substitute political loyalty for it. In making appointments to the Judicial Council, the governor will appoint people who are loyal to him, to his party, and to his way of thinking. Those people will owe their appointment to him, and will repay him by sending him the names of judicial candidates who are loyal to, and allied with, the governor. And he will appoint those people, based on their political loyalties instead of their professional qualifications.

In a complicated commercial dispute, I could care less about a judge's political leanings: I want a judge who is smart enough, and well regarded enough in the profession, to sort through the complicated commercial tangle and come up with a decision that gives certainty to businessmen who are trying to run a business, plan their investments, and make a profit. What I do not want is a political hack that has no professional qualifications other than that he is a friend of the governor.

If SJR 21 [HJR 33] is approved and the constitution amended, the effect will be to centralize power over the judiciary into the governor's office. The checks and balances that the framers built into the constitution will be weakened because the judiciary will no longer be a truly independent branch of government.

Finally, the supporters of SJR 21 [HJR 33] need to remember that the tides of politics come and go. The pendulum will swing one day, to a different group of political thinkers and leaders. When that happens, if power over the judiciary is centralized in the governor's office, the judiciary will change as well.

The private sector is best off if it has professionalism, neutrality and certainty in the judicial system. A judicial system that changes with the changing winds of political thought is a drag on the economy and destructive of true prosperity. When I

was the Vice President at Reeve Aleutian Airways, I had occasion to deal with a political judiciary, because Reeve ran routes to Russia. And I bear the scars to prove that the political nature of the Russian judicial system made for an incredibly difficult business environment. Let's not move in that direction here. Thank You

[2:17:02 PM](#)

REPRESENTATIVE LEDOUX surmised that Mr. Jensen believes with the passage of HJR 33 the judiciary would end up with a "bunch of political hacks," and then questioned his view of the federal judiciary, which is intellectually qualified but is appointed by the president.

MR. JENSEN related that the federal judiciary system is troublesome in that it resembles a pendulum that swings one way or the other depending upon the party of the president. Since politics ebbs and flows with different parties coming into office, he expressed concern with providing one individual with too much power. He opined that the goal for the judiciary is to be immune from that type of political "tug and pull, ebb and flow." He then that Alaska has a good system that should not be changed. The federal government's system is not necessarily good but it is certainly not the system used in Alaska, he further opined.

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REPRESENTATIVE MILLETT quiered whether Mr. Jensen's impression is that the AJC system is politically impartial. Recalling Republican Governors Murkowski and Palin rejecting names put forward for the AJC, Representative Millet asked if Mr. Jensen believes that there could be political leanings in the current selection process.

MR. JENSEN responded he did not believe there ever would be a perfect system to satisfy everyone's approach. However, he related his belief that when professionals are selected they must be well regarded by their colleagues, which in this case would be from the Alaska Bar Association. He opined there must be a balance with professionals that can qualify that individual based upon their experience and skills. While it is not always perfect and there may be someone that should have or should not gotten in, that is life, he further opined. To change from the current system and put it in the governor's office, he

expressed, is a profound change that will disrupt the impartiality of a judge who is ultimately deciding a dispute on the bench. Recalling his times as Vice President at Reeve Aleutian Airways Reeve Aleutian Airways served Russia with a lawsuit. He witnessed Russia's political judiciary system first hand and remarked that its political structure caused difficulty doing business. Therefore, Mr. Jensen reiterated his opposition to Alaska having a political judiciary that is the result of the election. Alaska's current system is the most balanced system to move forward, he noted.

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REPRESENTATIVE MILLETT said she disagreed with Mr. Jensen's comparison of the Russian judiciary to the Alaskan judiciary. She said that she agrees with HJR 33, but opined that Alaska is far from the corruption Reeve Aleutian Airway encountered when flying back and forth to Russia. She characterized it was a harsh distinction.

MR. JENSEN clarified that he did not intend to be harsh, and explained that his comparison with Russia was that he didn't trust the system and does not want the Alaskan court system to ever be questioned because it may have become political or perceived as beholdng to the governor. As a businessman working in Alaska, he reiterated the need to know the judge is impartial, professional, and able to render appropriate decisions.

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The committee took an at-ease from 2:24 p.m. to 2:25 p.m.

[2:27:13 PM](#)

REPRESENTATIVE LEDOUX related that she shares Mr. Jensen's concerns about politicizing the bench on "hot button" social issues; yet she understood his concern was more about having a smart and honest judiciary. On the federal bench, under a republican or democratic administration a judge may lean more conservatively or more liberal, respectively, but in regard to business and litigation questions, there is a high bar for the federal judiciary, she opined. From the perspective of business Representative LeDoux said she was uncertain why Mr. Jensen would be concerned.

MR. JENSEN responded that his business dealings did not rise to the federal level as all of his judiciary business dealings have been in Alaska. Alaska, he opined, does not want to appear to be following the federal government by changing the Alaska State Constitution. He further opined that with respect to the AJC and its makeup, the current Alaska State Constitution language presents and provides a very fair and balanced means to offer [judges] that have, in every case in which he has been involved, been impartial judges. If the desire is to parallel the federal system, Alaska's system would potentially be politicized. He specified that his testimony is solely in regard to the Alaska Judiciary System and in particular HJR 33, whereas discussions regarding the federal government are "outside my pay grade."

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REPRESENTATIVE GRUENBERG questioned if Mr. Jensen was aware that the Alaska selection method is based upon the "Missouri Plan." He explained that Americans had not always been happy with the federal judiciary plan as within the "New Deal" there was a very concerted effort to pack the U.S. Supreme Court, which was rebuffed. He indicated there is a similar attempt [embodied in HJR 33] to pack the AJC in Alaska, which he expected would also be rebuffed. Federally, he noted, the chief executive names an individual to a court and [the U.S. Senate] holds extensive hearings and discusses qualifications more than Alaska vets of members of the AJC. Usually, AJC candidates come before the [state] legislature for a few questions and are routinely passed on, he opined.

MR. JENSEN stated he had not been aware the Alaska framers used the "Missouri Plan" as a basis. He offered belief that the profession is being looked after by professionals within the current makeup of the [AJC]. The Alaska Bar Association is a professional organization and the public's regard for that profession and the Alaska Court System should be based upon a feeling of complete trust that the Alaska Bar Association is made up of professionals. As mentioned in prior testimony, there are certainly lawyers that may not be held in high regard by their peers, but he said he does not think having that morphed into the judicial system with respect to judges and [justices] should ever happen. "If the judicial system believes there is a bad judge, they tell us and I get to read the pamphlet about that; and they have done that, he pointed out. Whether the respected members of [the AJC] can agree on the qualifications of a judge is always open to dispute, which, he opined occurs in any committee. Allowing the governor to

appoint citizens to a committee which should be based upon professional qualifications would cause problems in terms of the perceptions of the justice system in Alaska, he opined.

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REPRESENTATIVE PRUITT, regarding Representative Gruenberg's comment that a lot of time the legislature glosses over [appointees] to the AJC pointed out that a few years ago the name of an appointee to the AJC was withdrawn due to the legislature. Therefore, the legislature does its due diligence and deserves credit for asking questions of the appointees. If something were to change, the legislature would still perform its role, he opined.

[2:38:44 PM](#)

GEORGE PIERCE characterized HJR 33 as a very bad resolution that he opposes. He expressed that HJR 33 could shift the balance of the judicial system, which is not broken and has been around since statehood. "We need to stay out of the constitution," he stated. In fact, a few years ago the voters opposed a constitutional convention. The AJC's makeup, he remarked, should not be [based] on the Alaska State Legislature or the American Legislative Exchange Council's (ALEC) agenda. He opined that HJR 33 is "stacking the deck" and is a waste of time. The resolution offers that non-lawyers would make decisions, which he opined, isn't a good idea. He then charged that the governor is not known to make good appointments. Within the last 39 years, the Chief Justice voted 15 times to break a 3:3 tie. Mr. Pierce suggested the [legislature] stop what it is doing [with HJR 33] as the existing system has worked since statehood.

[2:41:58 PM](#)

NICOLE BORROMEO, Alaska Federation of Natives (AFN), offered that the Alaska Federation of Natives (AFN) has three concerns with HJR 33 and offered the following statement:

First concern is that Alaska's Constitution is widely acknowledged as one of the best constitutions in the country. Accordingly, AFN believes there should be a clearly demonstrated reason to amend our state constitution before such a process is undertaken. Mr. Chairman and members of the committee, there is simply no evidence that suggests that the judicial council

has failed to function effectively or efficiently in performing its duties. In fact, Alaska's judiciary has been free of the corruption, scandal, and other ills that have plagued other non-merit based systems and this is largely due to the efforts of the Judicial Council. Second, HJR 33 seeks to increase the number of Judicial Council members for a host of reasons including guarding against attorney dominance. Again, AFN believes there should be clearly demonstrated evidence of such dominance. However, no evidence exists or knowledge to support the proposition that attorneys out-will non-attorneys in the selection of judges. In fact, AFN understands that in the last 30 years only 15 of the approximate 1,100 votes cast by the Judicial Council has resulted in a split between attorneys and non-attorneys. Finally, the fiscal note submitted by the Alaska Judicial Council shows an increase cost of \$12 thousand dollars for each fiscal year in 2016-2020. AFN believes this increase in \$60 thousand dollars is entirely unnecessary for the reasons we stated earlier, and by the previous commenter, and suggest that these funds could be better spent elsewhere. Thank you for your time and consideration of our comments.

[2:44:00 PM](#)

REPRESENTATIVE GRUENBERG questioned Ms. Borrromeo if she was aware that within the operating budget the AJC requested an increment of \$20,000 which could have been used to make certain ...

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REPRESENTATIVE MILLETT interjected a point of order stating that Representative Gruenberg's comment is a budget related issue and is not regarding HJR 33. She requested the committee members not discuss reductions in the operating budget, especially since it has yet to go to the floor.

REPRESENTATIVE GRUENBERG responded he was not planning to [discuss the budget], but the testimony as to the cost of HJR 33 [opened the door] to discuss [the budget]. His intention, he clarified was to describe the increase in [monies within HJR 33] while money for the AJC was not being increased.

[2:45:19 PM](#)

BENJAMIN MALLOT, Alaska Federation of Natives (AFN), stated he has the same points as Ms. Borrromeo.

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REPRESENTATIVE FOSTER asked if AFN's Resolution was passed by the AFN Board or passed at the October annual meeting in Fairbanks.

MS. BORROMEO responded the AFN Resolution was passed by the AFN Legislative and Litigation Committee, in February. The committee acts as the full board between regularly scheduled board meetings, she advised.

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BYRON CHARLES likened the [House Judiciary Standing Committee] to an administrative body with some powers and authority. He questioned why a representative from the local community, including the federal government, [is not] sitting there as part of the decision making and stated that if those individuals were included many conflicts would be alleviated on a government-to-government level.

[2:48:00 PM](#)

WALTER L. CARPENETI [appointed to the Alaska Supreme Court in 1998 and served as the 16th Chief Justice from 2009 to 2012] states he is representing himself and no other entity. He offered that there are three reasons not to advance this resolution. He also offered that this subject matter is not one involving an attorney verses non-attorney split on the AJC. During the last two years there are possibly three votes with which people are unhappy, but the Alaska State Constitution has endured for 55 years and has been amended only 28 times, including technical amendments such as changing the name from the Secretary of State to the Lieutenant Governor. Amending the Alaska State Constitution should be entered into carefully and only with a very good reason, he opined. Since the beginning there have been over 1,100 votes of which only 15 votes were split between non-attorney members and attorney members. "You just don't have a problem in my view." The facts do not bear out a generalized claim of attorney dominance with the attorneys "running the show" as the count is 4:3 because the Chief Justice is obviously an attorney. He reiterated not to lose sight of the aforementioned facts because this resolution would require a

change in a system that has worked well. He maintained there is a heavy burden on those who would amend the Alaska State Constitution to show that something is not working as opposed to hypothetical and generalized talk of accountability or citizen participation. He then underscored that all of the lawyers are citizens. When an individual states Alaska's judicial selection system is not working, he said he contemplates whether Alaska has judges being indicted, involved in scandals, receiving kick-backs, or the sort of problems realized in other [state] judiciaries. However, those types of events do not take place in Alaska's judiciary system. Mr. Carpeneti then stated that he takes slight exception Mr. Leman's testimony and clarified that he did not say that [HJR 33] would destroy the merit system, but rather said it "could" destroy the merit selection system which should give supporters of [HJR 33] pause. He explained that [HJR 33] "could" destroy the merit system as currently no entity controls the names that go to the governor and if legislators insist on thinking of lawyers as non-citizens or lawyers on one side and citizens on the other, remember the numbers illustrate that has hardly ever happened. Once [HJR 33] changes the composition of the system to six non-attorneys and three attorneys, the legislature has given the governor the right to specifically determine the composition of the panel. Currently, the governor does not have that power and the framers thought hard about whether the governor should have that power, he further explained.

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MR. CARPENETI commented on Mr. Leman's statement about Alaska's strong governor system, admitted he has not read every constitution of every state closely, but he does have the firm opinion that Alaska's framers intended Alaska to have the strongest governor in the United States. He said the framers wanted accountability to rest with one person, which is why Alaska's attorney general is not elected. The only elected positions statewide are the governor and lieutenant governor and everyone else, including the lieutenant governor, is accountable to the governor, which is a very clear responsibility in the state's system. Alaska's framers weighed how much power the governor should have and even though they made Alaska's governor one of the strongest governors in the United States, the framers stopped short of providing the governor the authority to choose the majority of citizens who would nominate Alaska's judges, he noted. He specifically stated that Alaska's framers created that system wherein the judiciary would have a certain amount of independence; if the governor has the authority to name the

majority of the nominees, there will be nominees representing the governor's point of view as that is the nature of a political system.

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CHAIR KELLER requested clarification whether Mr. Carpeneti is saying the reason Alaska does not have problems like those in other states is because Alaska has an attorney-dominated judicial council that's small.

MR. CARPENETI replied "no," the AJC is not an attorney-dominated system rather it is evenly balanced. He reiterated that out of over 1,100 votes there have only been 15 occasions in which the attorneys and non-attorneys split evenly and the Chief Justice had to make a decision. According to the figures he has been given, which he expressed the need to recheck, on 10 of those 15 occasions in which there was a split the Chief Justice agreed with the attorneys and on 5 occasions the Chief Justice agreed with the non-attorneys. Mr. Carpeneti recalled he had three occasions to vote as Chief Justice of which twice he agreed with the non-attorneys and once he agreed with the attorneys. Two of those occasions the vote was to send names to the governor and one occasion the vote was not to send a name to the governor, he offered.

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MR. CARPENETI noting his respect for Mr. Leman said he took exception with Mr. Leman's comment that "politics are already in the system." Speaking from his own experience, Mr. Carpeneti described a situation in which a friend asked whether one of his colleagues on the Supreme Court was still real conservative. Mr. Carpeneti explained that he was shocked because for several years someone that he sat with in a very intimate political setting was a person who was a cipher to him in terms of answering that question. He opined that it was good that he could not tell whether one of his colleagues was conservative or not conservative, because in terms of the selection process and in terms of what the court does when judges are considering cases, those kinds of issues just don't come up. "They are not part of what we do," he said. Perhaps Mr. Leman was saying that politics are already in the system as some of the people on the council vote one way or another based on what they think someone will do in the future on a particular case. If that's what Mr. Leman meant, Mr. Carpeneti said he does not know if that is true or not. He informed the committee that he was on the AJC as a

lawyer in the early 1980s and again as the ExOfficio Chair as the Chief Justice from 2009-2012, and never in either of those appointments had he ever heard somebody say how a person would vote on an issue. Those things just don't come up in the council, he opined. He depicted that the governor receives names of people who the AJC members believe, whether they are liberal or conservative or even have an idea about those things, will be careful lawyers who will read the record, act with integrity and respectful of both sides, keep their minds open until they've heard all of the arguments, hold discussions with their colleagues, and will be good judges [of the applicants]. He expressed fear that some of those values may be lost in a system in which the governor appoints the majority of the people on the AJC. The framers were brilliant in setting up a two-stage merit/political selection process. He explained that the first stage, the merit stage, is when a candidate applies to the AJC and it reviews the professional reputation, intelligence, writing skills, fairness and integrity, and all of the attributes an individual would hope to find in a judge, and the AJC then sends the best of those candidates through to the governor. The second stage is the political stage when the governor who is there as a result of politic, chooses from among the candidates that hopefully are all going to be excellent, the one that is closest to his or her views. Mr. Carpeneti stated that elections have consequences and should have consequences and the proper place for politics to enter into the selection process is [at the second stage] with the governor. He opined that Alaska's framers wisely decided there should be a check [included in the selection process], which is the retention election that occurs three years after a judge has been on the bench. He stated that [HJR 33] essentially gives the governor the power to say what the governor wants. Although the candidates may meet all of the aforementioned attributes, they may not, which is why he stated it could lead to the destruction of the merit system. "It is not worth that risk, in my opinion," he said.

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REPRESENTATIVE MILLETT questioned whether MR. CARPENETI would feel more comfortable if the six individuals the governor appointed were attorneys and considered fair and competent and in good standing with the Alaska Bar Association.

MR. CARPENETI answered that he would be "perhaps minimally less uncomfortable, but that's damning it with faint praise." Clearly, he stated, in making any selection the governor will

choose individuals - whether attorney or non-attorney - along the same line of thinking as he/she, which is appropriate except when there is a majority of those people on any given council. The Alaska Constitutional Convention minutes are interesting in that lawyers know other lawyers well and lawyers do not want an individual on the bench they consider not to be responsive to the law. He opined that 99-plus percent of cases before the courts have nothing to do with issues that peak the community's interest or are the "hot button" issues. The majority of cases before courts are to determine the legislature's intent when it wrote a statute that possibly does not cover a particular case. He further explained that politics just does not enter, in any sense into so many of the judge's decisions. He expressed hope to continue with a system that offers a list of excellent potential judge's to the governor. With regard to the situation when Governor Murkowski rejected the names offered from the AJC because the individual he anticipated appointing to the Superior Court was not on the list, Governor Murkowski ultimately made an appointment of an individual who is now on the Supreme Court. There is no doubt what an excellent choice the judge was because the system worked, he opined.

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REPRESENTATIVE MILLETT expressed her concern regarding the Alaska Bar Association poll attorney comment section, of which some comments are unsigned. Although she said she understood the AJC doesn't give much weight to those, she opined the unsigned attorney comments should carry no weight whatsoever. Due to the fact no direction is provided within the Alaska State Constitution regarding the AJC's process, she suggested reviewing this issue in the AJC's regulations.

MR. CARPENETI related that within the Judicial Council By-laws, anonymous comments are not given weight unless they are investigated and something is found. In defense of anonymous comments, he stated, the bar poll is regarding an individual who could move into a powerful position and some people are not comfortable signing their name. The question is whether anonymous comments should be disallowed, although there is the possibility of learning something that could be a problem with further investigation, or not have it at all, he commented. For example, in the event the AJC receives an anonymous comment that an applicant for a judgeship has a serious drinking problem. If there is any supporting evidence, it should be investigated and especially when there is more than one anonymous comment. He described when he was Chief Justice, the Alaska Judicial Council

Executive Director investigated such an allegation by interviewing local citizens and specific incidents claimed on specific dates. Ultimately, the director came to the conclusion there was no evidence behind the allegation, notified the AJC, and the AJC continued on. On the other hand, what if there had been merit to the comment, he highlighted. He explained that in the event an individual applies for judgeship, the council thoroughly vets and delves into the individual's life by obtaining criminal records, credit records, interviewing lawyers on the other side of cases, and speaking with sitting judges. While Mr. Carpeneti said he does not approve of someone writing untrue allegations, he said he would rather have the escape valve and investigate.

[3:07:03 PM](#)

CHAIR KELLER asked where Mr. Carpeneti is excluding judicial philosophy from whatever definition of political he is using. He advised that the Alaska State Constitution states "without regard of political affiliations," but there is a connection between the judiciary and the citizenry of the State of Alaska. If that were not true, there wouldn't be the effort have a geographic representation. He opined there must be some sort of litmus test used by the citizenry when there is a retention vote. An individual cannot escape "political" in the manner Chair Keller would use the term. He opined that the Alaska Bar Association's world view or its judicial philosophy may or may not align with that of the majority of the people of Alaska. Therefore, he related his belief that it is completely legitimate to put, for example, the judicial philosophy is possibly liberal conservative as a consideration for the people of Alaska. He further opined that the founders did not intend to make the isolation such that the judicial branch is completely beyond and above those kinds of judgments.

MR. CARPENETI offered that he did not disagree with Chair Keller's comments. He explained that his concern is that in seeking the correct balance it not be changed such that political consideration or judicial philosophy, which is proper at the second stage, is moved into the first stage and then overwhelms the first stage. If the aforementioned should happen, the idea of merit selection is lost, he opined.

[3:09:44 PM](#)

CHAIR KELLER replied that [HJR 33] is proposing to find that line.

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REPRESENTATIVE LEDOUX related that one rationale for HJR 33 is that the Chief Justice would not be required to vote and possibly be accused of partisan behavior. She requested his thoughts as former Chief Justice of the Alaska Supreme Court and as a person on the AJC, regarding whether he believed being accused of partisan behavior was ever a problem.

MR. CARPENETI responded that Representative LeDoux phrased the question a bit differently than Mr. Prax, as Mr. Prax stated it was to keep the Chief Justice out of a conflict of interest, while Representative LeDoux stated it was not necessarily a conflict of interest but an awkward position. He related he was not trying to be willfully ignorant, but he just did not understand the conflict of interest argument. Prior testimony stated that if it is a Superior Court Judge going up for the Court of Appeals or the Alaska Supreme Court, the Chief Justice is put in the position of saying "yes" or "no" to the judge. Mr. Carpeneti emphasized that is what the Chief Justice does every day of his/her life as they review decisions of other judges to determine if the judge ruled correctly or not, and it is not a conflict to say "yes" or "no" to a judge. The Chief Justice is directed by the Alaska State Constitution to send the very best names to the governor and the constitutional phrase in the debates was "the tallest timber." He offered that it is not a conflict to say that while an individual is very qualified and a good judge, the other candidates who have already made it through are clearly in a higher group. Without violating any confidences, that is exactly what Mr. Carpeneti said he did the one time he voted "no."

[HJR 33 was held over.]

3:13:09 PM

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:13 p.m.