ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
March 7, 2014
1:12 p.m.
DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT

MEMBERS PRESENT

Representative Wes Keller, Chair
Representative Bob Lynn, Vice Chair
Representative Neal Foster
Representative Lance Pruitt
Representative Max Gruenberg
Representative Gabrielle LeDoux

MEMBERS ABSENT

Representative Charisse Millett

COMMITTEE CALENDAR

HOUSE BILL NO. 255
"An Act relating to unmanned aircraft systems; and relating to images captured by an unmanned aircraft system."

- MOVED CSHB 255(JUD) OUT OF COMMITTEE

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. 127
"An Act clarifying that the Alaska Bar Association is an agency for purposes of investigations by the ombudsman; relating to compensation of the ombudsman and to employment of staff by the ombudsman under personal service contracts; providing that certain records of communications between the ombudsman and an agency are not public records; relating to disclosure by an agency to the ombudsman of communications subject to attorney-client and attorney work-product privileges; relating to informal and formal reports of opinions and recommendations issued by the ombudsman; relating to the privilege of the

ombudsman not to testify and creating a privilege under which the ombudsman is not required to disclose certain documents; relating to procedures for procurement by the ombudsman; relating to the definition of 'agency' for purposes of the Ombudsman Act and providing jurisdiction of the ombudsman over persons providing certain services to the state by contract; and amending Rules 501 and 503, Alaska Rules of Evidence."

- BILL HEARING CANCELED

PREVIOUS COMMITTEE ACTION

BILL: HB 255
SHORT TITLE: UNMANNED AIRCRAFT SYSTEMS
SPONSOR(s): REPRESENTATIVE(s) HUGHES, HIGGINS, THOMPSON, PRUITT

01/21/14	(H)	PREFILE RELEASED 1/17/14
01/21/14	(H)	READ THE FIRST TIME - REFERRALS
01/21/14	(H)	STA, JUD
01/28/14	(H)	STA AT 8:00 AM CAPITOL 106
01/28/14	(H)	Heard & Held
01/28/14	(H)	MINUTE(STA)
02/04/14	(H)	STA AT 8:00 AM CAPITOL 106
02/04/14	(H)	Moved CSHB 255(STA) Out of Committee
02/04/14	(H)	MINUTE(STA)
02/05/14	(H)	STA RPT CS(STA) 3DP 4NR
02/05/14	(H)	DP: ISAACSON, KREISS-TOMKINS, HUGHES
02/05/14	(H)	NR: MILLETT, GATTIS, KELLER, LYNN
02/12/14	(H)	JUD AT 1:00 PM CAPITOL 120
02/12/14	(H)	Heard & Held
02/12/14	(H)	MINUTE(JUD)
03/05/14	(H)	JUD AT 1:00 PM CAPITOL 120
03/05/14	(H)	Scheduled But Not Heard
03/07/14	(H)	JUD AT 1:00 PM CAPITOL 120

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
03/05/14	(H)	Heard & Held
03/05/14	(H)	MINUTE(JUD)
03/07/14	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

REPRESENTATIVE SHELLEY HUGHES
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Testified as one of the prime sponsors of HB 255.

GINGER BLAISDELL, Staff
Representative Shelley Hughes
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Speaking on behalf of Representative Shelley Hughes, one of the joint prime sponsors of HB 255, answered questions.

ANNE CARPENETI, Assistant Attorney General
Legal Services Section
Criminal Division
Department of Law (DOL)
Juneau, Alaska
POSITION STATEMENT: During the hearing of HB 255, answered questions.

ERNEST PRAX, Staff
Representative Wes Keller
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Speaking as staff to the House Judiciary Standing Committee, which Representative Wes Keller chairs, explained changes embodied in CSHJR 33, Version U.

WALTER L. CARPENETI
Juneau, Alaska
POSITION STATEMENT: Expressed concern with HJR 33.

ROBERT FLINT
Anchorage, Alaska
POSITION STATEMENT: Testified in support of HJR 33.

KEVIN FITZGERALD
Anchorage, Alaska
POSITION STATEMENT: During the hearing of HJR 33, testified that the merit system process in Alaska is the gold standard.

MICHAEL PAULEY
Alaska Family Action (AFA)
Seattle, Washington

POSITION STATEMENT: Testified in support of HJR 33.

ELEANOR ANDREWS
Anchorage, Alaska
POSITION STATEMENT: During the hearing of HJR 33, testified that the existing system works.

BILL GORDON
Fairbanks, Alaska
POSITION STATEMENT: Testified in opposition to HJR 33.

FRITZ PETTYJOHN
Standard, California
POSITION STATEMENT: Testified in support of HJR 33.

MIKE COONS
Palmer, Alaska
POSITION STATEMENT: Testified in support of HJR 33.

NANCY MEADE, General Counsel
Administrative Staff
Office of the Administrative Director
Alaska Court System (ACS)
Anchorage, Alaska
POSITION STATEMENT: Testified in opposition to HJR 33.

SUZANNE DiPIETRO, Executive Director
Alaska Judicial Council
Juneau, Alaska
POSITION STATEMENT: Testified regarding her role as Executive Director of the Alaska Judicial Council.

KEN FISCHER
Juneau, Alaska
POSITION STATEMENT: Testified in support of HJR 33.

ACTION NARRATIVE

1:12:05 PM

CHAIR WES KELLER called the House Judiciary Standing Committee meeting to order at 1:12 p.m. Representatives Lynn, Foster, Pruitt, Gruenberg, LeDoux, and Keller were present at the call to order. Representative Millett arrived as the meeting was in progress.

^#HB255

HB 255-UNMANNED AIRCRAFT SYSTEMS

CHAIR KELLER announced that the first order of business is HB 255. "An Act relating to unmanned aircraft systems; and relating to images captured by an unmanned aircraft system." [Before the committee is CSHB 255(STA).]

1:12:26 PM

REPRESENTATIVE LYNN moved to adopt proposed CSHB 255 Version 28-LS1068\P, Strasbaugh, 3/4/14 as the working document.

1:12:55 PM

REPRESENTATIVE GRUENBERG objected.

1:12:59 PM

REPRESENTATIVE SHELLEY HUGHES, Alaska State Legislature, on of the joint prime sponsors, stated there are two concerns addressed [in Version P] The first concern was expressed by the statewide archivist regarding how images no longer required would be handled. The second concern addressed in Version P is regarding unmanned aircraft used in search and rescue, but not necessarily involved in criminal activities. This change respects the importance of privacy and abides by the Alaska State Constitution and U.S. Constitution, she offered.

1:14:08 PM

GINGER BLAISDELL, Staff, Representative Shelley Hughes, Alaska State Legislature, speaking on behalf of Representative Hughes, one of the joint prime sponsors, stated that [Version O] page 2, lines 26-27, originally read "A law enforcement agency may use an unmanned aircraft system to gather evidence in a criminal investigation." The sponsors' intent in [Version P] is in the event a search and rescue event turns into a criminal investigation that it be admissible in court. The language on page 3, lines 2-5, is regarding a law enforcement agency using information gathered by an unmanned aircraft system while enforcing personal privacy. She explained the main intent of the Unmanned Aircraft Systems Legislative Task Force ("Task Force") is to guard personal privacy and allow law enforcement agencies to use unmanned aircraft systems as a tool. Version P also addresses the concern of the statewide archivist [Dean Dawson] regarding existing state law and the requirement to retain images. For law enforcement purposes, Version P

specifically identifies that images may not be retained without a law enforcement purpose to keep them. There are a number of existing laws regarding law enforcement's custody of retained images that explain the retention length and how the images are to be retained. House Bill 255 instructs law enforcement to dispose of images when performing training runs or a completed search and rescue event.

1:16:37 PM

REPRESENTATIVE PRUITT assumed law enforcement would require only the [images] relevant to its investigation. He questioned the specific amount of time images not relevant to its investigation remain in law enforcement's custody.

MS.BLAISDELL deferred to Anne Carpeneti, Assistant Attorney General, as she is familiar with various scenarios, lengths of time, and the type of data required to be retained.

1:18:01 PM

REPRESENTATIVE GRUENBERG directed attention to the language [in Version P] on page 2, line 28, "to gather evidence in a criminal investigation" and contrast it with the language on page 3, lines 2-3, which read, "... for uses not involving a criminal investigation and not intended to lead to the production of evidence for use in a criminal investigation, ..." He pointed out that technically there may be a loop hole and suggested the language might also include on page 2, line 28, the phrase "to gather evidence in a criminal investigation or intended to lead to the production of evidence for use in a criminal investigation" since [proposed A.S. 18.65.903(a)] (3) breaks it out. He suggested to both Ms. Blaisdell and Ms. Carpeneti that the language could potentially lead to a misinterpretation.

MS. BLAISDELL responded that the change from [CASB 255(STA)] to "only able to be used for a criminal investigation," to the change in [Version P] is for law enforcement's use which allows it to be used for a general public purpose as well as a criminal investigation. The language in Version P, page 2, line 28, discusses the use of a warrant in a criminal investigation. The language on page 3, [lines 2-5], (2) discusses situations and uses not specifically involving a criminal investigation, such as search and rescue, Amber alert, bomb squad type of use, and a variety of issues, she explained.

1:21:26 PM

REPRESENTATIVE HUGHES surmised that Representative Gruenberg was referring to a [search and rescue event] that turned criminal.

REPRESENTATIVE GRUENBERG clarified that he is referring to the time before an event turned into an investigation. He advised it was a technical question.

REPRESENTATIVE HUGHES pointed out that the language on [pages 2-3], line 31 [and line 1, respectively], "[B]] in accordance with the judicially recognized exemption to the warrant requirement in AS 12:35; ..." would cover search and rescue events that become evidential for a criminal investigation. She reiterated that subparagraph (B) on [Page 2], line 31, would cover those situations and questioned if that was what Representative Gruenberg was referring to.

REPRESENTATIVE GRUENBERG responded that her comments would normally be the case, but because the language is broken out in [page 3, lines 4-5] there is a situation that has not yet and never does ultimately turn into a criminal investigation. He reiterated that this is a technical question.

REPRESENTATIVE HUGHES noted that the aforementioned language on page 3, line [3], read "not intended to lead to the production of evidence ..." However, she stated that was not the original intent, but it actually could lead to [evidence].

REPRESENTATIVE GRUENBERG responded that there could be a situation that falls between the cracks in which something was intended to lead to the production of evidence for use in a criminal investigation. He expressed the need to avoid an unintended loop hole.

1:24: 21 PM

ANNE CARPENETI, Assistant Attorney General, Legal Services Section, Criminal Division, Department of Law (DOL), said the Department of Law is concerned that there is not a gap in law enforcement's ability to gather evidence in cases in which it is fair and not a violation of privacy. The desire was for law enforcement to be able to use images obtain from drones in a non-criminal investigation such as locating a lost individual on a search and rescue mission, when the situation turns out to be a crime scene. Law enforcement wants to be able to use those photographs in the prosecution of the defendant as and there is certainly no reasonable expectation of privacy in that

situation. She related her understanding that is the reason paragraph (2) [on page 3, lines 2-5] was drafted. If there are any gaps, she expressed the need to address them.

1:26:07 PM

REPRESENTATIVE GRUENBERG suggested that analytically the language may lead to situations that do not technically fall under one or the other scenarios. He further suggested the cure may be to add language on [page 2,] line 28, such that paragraph (1) would read "to gather evidence in a criminal investigation or intended to lead to the production of evidence for use in a criminal investigation." He explained it is similar to the broader discovery rules in civil cases wherein a party may ask for the production of evidence for use in the trial or evidence that could lead to the production of evidence in a criminal trial. This is a discovery situation and civil rules are specifically designed so there is no gap, he opined.

MS. CARPENETI said although she thinks Representative Gruenberg's suggested language is unnecessary, she will conduct further research and can work with the sponsor.

CHAIR KELLER advised subsequent to Ms. Carpeneti's review any technical change could be conducted on the House floor

REPRESENTATIVE LYNN questioned whether the inclusion of Representative Gruenberg's language would cause any harm.

MS. CARPENETI responded that she did not believe it would cause harm, but reiterated the language is unnecessary.

REPRESENTATIVE HUGHES offered to work with Ms. Carpeneti and if the language is necessary it could be changed in the House Rules Standing Committee. The Task Force does not want anything slipping through the cracks, she opined.

1:29:54 PM

MS. CARPENETI, responding to Representative Pruitt's earlier question, stated that the language in HB 255 has a reasonable expectation of privacy under circumstances in which footage is not used as it is not relevant to any criminal prosecution.

1:30:42 PM

REPRESENTATIVE PRUITT related his intention is that the footage applies to the specific purpose for which the drone is intended at that time. Otherwise, he expressed concern about putting drones in the air to see if they capture images of anything [criminal].

MS. CARPENETI responded that the focus of the Task Force is to adopt rules that protect privacy while at the same time allow these instruments of the future usable for [law enforcement] when necessary.

REPRESENTATIVE PRUITT remarked that the retention piece is part of the whole discussion in how long [law enforcement retains data] as his concern is the time frame each of those images are retained.

1:32:17 PM

REPRESENTATIVE LYNN inquired as to the difference between a drone taking photographs from above and a security camera at street level. He further inquired as to how long images from a security camera on the street are retained.

MS. CARPENETI replied that the difference is that someone walking down the street has less expectation of privacy than a person at a remote cabin where there are no roads and a higher expectation of privacy exists. Essentially, she said it depends upon the facts and what citizens expect when performing certain acts, as most people do not expect to be private while walking down a street.

REPRESENTATIVE HUGHES related her understanding that images taken with a public security camera on state buildings are retained for 30-days. She advised that Alaska has high powered cameras that can be attached to an unmanned aircraft, a car and a person could carry it. The Task Force understands the potential privacy issues and is always considering the privacy aspect. Moreover, the Task Force realizes that the legislation should be somewhat neutral as far as the tool because the operator of the tool and the state must be certain the operator is doing the right thing, no matter to what the camera is attached. She explained that the Task Force's amendment is that if the images are not needed that they are considered confidential and not part of public record. She assumed the law enforcement agencies would dispose of them immediately.

REPRESENTATIVE LYNN highlighted his overall concern that the focus is on [the unmanned aircraft system] while there are security cameras everywhere. He opined that he does not have an expectation of privacy much anymore.

REPRESENTATIVE PRUITT, regarding Ms. Carpeneti's comments about the cabin scenario, said they apply in a residential situation also. If drones are flying over residential areas, a person in his/her back yard should have the same expectation of privacy as at a cabin.

1:36:50 PM

REPRESENTATIVE GRUENBERG questioned, in reference to page 2, lines 29-30, whether a search warrant that is not issued pursuant to state law, but issued pursuant to a federal order should read "(A) under the express terms of a search warrant issued under court order," rather than "AS 12.35."

MS. CARPENETI responded that Representative Gruenberg's suggestion was excellent and one with which she completely concurred.

1:37:51 PM

REPRESENTATIVE GRUENBERG referred to the language on pages 2-3, lines 31 and l, respectively, "(B) in accordance with a judicially recognized exception to the warrant requirement in AS 12.35." [The warrant] may be judicially recognized, particularly if it is a federal warrant issued under an exception under federal law. He expressed concern that Alaska may have a judicially recognized exception that has never been ruled on, but would be judicially recognized elsewhere. For example, there could be a scenario wherein a smart lawyer alleging "this" is judicially recognized in Nebraska and 43 other states, but has not arisen in Alaska. Therefore, he suggested the language should not cite just the one statute [AS 12.35], but should say "recognized under law."

MS. CARPENETI responded it would be best to leave it under state law as under federal search and seizure law there is a good faith exception to the warrant requirement and she did not know if Alaska's court had adopted it yet. The [use of an unmanned aircraft system by a law enforcement agency] would be best tied to judicially recognized exceptions under state law, she remarked.

1:41:00 PM

REPRESENTATIVE GRUENBERG suggested a conceptual amendment in which on page 2, lines 29-30, the language "... AS 12.35" would be replace with the following language "... a valid court order."

MS. CARPENETI responded that although it is difficult for her to imagine Alaska going to another court to obtain a court order to allow Alaska to perform drone surveillance, a court order is fine because it is more general. At the same time, she related the preference to limit the judicially recognized exceptions to state law exceptions.

1:42:43 PM

REPRESENTATIVE GRUENBERG questioned Ms. Carpeneti as to whether she had any problem with the committee substitute.

MS. CARPENETI responded no, noting that she has had been an excellent working relationship with the sponsor and her staff.

1:43:05 PM

REPRESENTATIVE GRUENBERG removed his objection to adopting CSHB 255, Version P. There being no further objection, Version P was before the committee.

CHAIR KELLER closed public testimony and stated CSHJR 33(JUD) Version P is before the committee for discussion.

1:44:04 PM

REPRESENTATIVE GRUENBERG moved Conceptual Amendment 1, as follows:

Page 2, line 30
Delete "AS 12.35"
Insert "court order"

1:44:32 PM

CHAIR KELLER objected and requested that the sponsor work with DOL in the event there is a problem with the language of Conceptual Amendment 1. Chair Keller then removed his objection. There being no further objection, Conceptual Amendment 1 was adopted.

1:45:07 PM

REPRESENTATIVE LYNN move to report CSHB 255 (JUD), 28-LS1068\P, Strasbaugh, 3/4/14, as amended, out of committee with individual recommendations and the accompanying fiscal notes. There being no further objection CSHB 255(JUD) was reported from the House Judiciary Standing Committee.

1:45:26 PM

The committee took an at ease from 1:45 p.m. to 1:48 p.m.

^#HJR33

HJR 33-CONST. AM: MEMBERSHIP OF JUDICIAL COUNCIL

1:48:13 PM

CHAIR KELLER announced that the final order of business would be HJR 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."

1:48:51 PM

ERNEST PRAX, Staff, Representative Wes Keller, Alaska State Legislature, speaking as staff to the House Judiciary Standing Committee, which Representative Wes Keller chairs, explained changes embodied in CSHJR 33, Version U and stated that the committee substitute, labeled Version 28-LS1509\U, Wallace, 3/3/14, requires that all member appointments of the Alaska Judicial Council (AJC) be confirmed by the legislature. He further explained that given that the total voting membership would increase to nine members, the AJC will take action with the concurrence of five or more members. Those are the only two changes, he remarked.

1:49:53 PM

REPRESENTATIVE LYNN moved to adopt proposed committee substitute (CS) for HJR 33, Version 28-LS1509\U, Wallace, 3/3/14, as the working document.

CHAIR KELLER objected.

1:50:26 PM

CHAIR KELLER advised he is in receipt of an email from the Alaska Court System with which he is "appalled and frustrated" because it seems to indicate there has been a recruiting process for testimony against HJR 33, which he characterized as a bit political since the committee is discussing "a situation that is not supposed to be there." Chair Keller expressed frustration and pointed out that the judiciary's role is to interpret and apply laws the legislators write. Although the courts have been very good terms of working with this committee, he said he is at a loss how the addition of three non-attorney members to the AJC is so earthshaking for the courts that it chooses to get involved.

1:53:07 PM

REPRESENTATIVE GRUENBERG requested that at the appropriate time he would like the opportunity to respond to Chair Keller's comments regarding the email and as a member of the other party hoped he would receive an equal opportunity to state his views.

1:53:40 PM

CHAIR KELLER advised Representative Gruenberg would have an opportunity to respond. He then refreshed the committee's memory that at the last hearing the last question Mr. Carpeneti was asked by Representative Lynn is the potential conflict of interest issue in HJR 33 to which Mr. Carpeneti had responded that he did not see the conflict. Chair Keller noted he had reviewed the AJC rules and the conflict of interest issue is addressed. He opined that legislators are very sensitive to what a conflict of interest is because often they don't even see it coming and get confused. He further opined that HJR 33 is an attempt to ease that potential dilemma.

1:56:09 PM

WALTER L. CARPENETI stated he is representing himself, not the Alaska Court System. With regard to Chair Keller's concern about an email, he advised he had not spoken with any of the members of the Alaska Court System, but has been told that it is against HJR 33 as it uniquely affects judicial operations. He added he is no longer performing pro tem, is not a judge. With regard to conflict of interest, judges have to fill out those forms also. The critical component of a conflict of interest, he emphasized, is to define what it is. He reiterated from his previous testimonies that he does not know what the conflict is

in a judicial officer in rare occasions, 15 times in the last 30 years, casting a vote as to whether a person meets the standards that the framers set out in the Alaska State Constitution and amplified in the bylaws to be on the court. He recalled the comment that since he is a judge and a judicial officer and some of the applicants are judicial officers, he is placed in a position conflict. However, Mr. Carpeneti pointed out that for a living, appellate judges review lower court judges' decisions to decide whether they're right or wrong. He further reiterated he could not see a conflict in a judicial officer applying a standard to a particular situation and deciding that the standard is met or is not met.

1:58:13 PM

MR. CARPENETI, regarding questions at the last hearing about whether there are problems in the federal system, opined that if he had to put the history of the federal system up against the history of the Alaska system in [in terms of corruption], there is no question the Alaska system would be the hands down winner as Alaska has none of those things in its history. Furthermore, the Alaska system is much more transparent than the federal system as the AJC's work is largely open to the public, interviews can be open if the candidates agree, results of the bar poll are open, the process is open, and the votes themselves are open as the public has the opportunity to read how each AJC member voted. On the other hand, the federal system is virtually a non-transparent system. He explained that in 1952 or 1953, President Eisenhower asked the [American] Bar Association to rate candidates and did so because President Eisenhower said he wanted to lessen the political influence in the selection process and introduce merit into it. Every president up until the second President Bush followed the procedure of determining a list of potential nominees forwarding the list to the American Bar Association Standards Review Committee on the Federal Judiciary, for review and determination whether the applicant is not qualified, qualified, or well qualified. The aforementioned played a very important role in how that nominee was rated. There is important lawyer involvement in both the federal and the Alaska system, he remarked. Mr. Carpeneti maintained that the Alaska system is better than the federal system.

2:01:24 PM

REPRESENTATIVE LYNN posed a scenario with the AJC wherein there is a tie vote which requires the Chief Justice's vote to break

the tie, except the Chief Justice has an actual conflict of interest and cannot vote.

MR. CARPENETI responded that he did not know the answer to the question and stated he would have to look at the bylaws before answering definitively.

REPRESENTATIVE LYNN noted that in legislative amendment situations when there is a conflict of interest by a member which causes a tie vote, the amendment fails.

MR. CARPENETI said that although he did not believe that had ever happened in the AJC's history, he did not know the answer.

2:02:43 PM

REPRESENTATIVE GRUENBERG asked Mr. Carpeneti if he had attempted to respond to Chair Keller's comments regarding the email from the court system.

MR. CARPENETI clarified he was simply making his position clear in that he is representing himself, although his understanding is that the Supreme Court's position is that it opposes HJR 33. He noted it is fairly rare for the Supreme Court to advise [its position] although it sometimes does. In fact, the Model Code of Judicial Conduct for judges essentially says that judges are not too be involved in issues unless they involve the administration of justice, which he assumed is the basis for its position.

2:03:51 PM

REPRESENTATIVE GRUENBERG remarked that Mr. Carpeneti is almost an expert witness because he was the Chief Justice of the Supreme Court of Alaska and on the courts for many years. Representative Gruenberg related his understanding that the "Model Code of Judicial Conduct: Canon 5 Commentary" in Section A (1), specifies judges should be able to take part in the public debate over proposals to change the legal system or the administration of justice and that incumbent judges can engage in political activity on behalf of measures to improve the law, the legal system, or the administration of justice. He inquired as to Mr. Carpeneti's understanding of Canon 5, and how the issue [of judicial conduct] is covered, and the role of the Alaska Commission on Judicial Conduct as [it] would be the place to address any potential violation of the Model Code of Judicial Conduct.

MR. CARPENETI, reiterated that he had speculated the Alaska Court System took its current position under the umbrella of [Canon 5]. He expressed that he is not concerned with the Supreme Court's position on a matter affecting the administration of justice and further expressed that the [Supreme Court's position] would not give rise to concerns about a referral to the Alaska Commission on Judicial Conduct.

2:06:44 PM

REPRESENTATIVE PRUITT, recalling Mr. Carpeneti's concern in potentially giving the governor authority to steer the direction of the judiciary, questioned whether judiciary members are immune from a bias.

MR. CARPENETI responded no, adding that everyone has a bias.

2:07:52 PM

REPRESENTATIVE PRUITT questioned whether the judiciary should have the same values or potentially the same mind-set as the citizens of Alaska.

MR. CARPENETI responded that members of the judiciary should share basic values with the citizens of Alaska in terms of respect for the rule of law, respect for giving each side an opportunity to be heard, respect for not having specific positions with regard to an outcome of a case, he explained. Being human, judges must set aside any particular predisposition, and [review], listen to the law, compare it with the facts, and reach a decision, which is exactly what judges ask jurors to do every day. When judges are not doing fact finding, they are analyzing an ambiguous statute the legislature passed to [decipher] how [the case] should come out, which is where judges set aside their predispositions. He stressed that as a judge every day of his life, especially as a trial judge, he made decisions he would not have made had he been in the legislature writing the statute. Although the system is that judges follow laws received from various other sources, judges do not come to the bench as a blank slate but as a person having lived a life. When it comes to judging, the state wants [judges] who are willing to identify their own biases, to the extent that any of us can, and consciously put them aside to decide on the facts of the law. Mr. Carpeneti expressed concern with a system that authorizes one person, the governor, the right to name a majority of the members of the AJC as it could

potentially lose the impetus to send names of applicants to the governor that meet that aforementioned standard.

2:10:31 PM

REPRESENTATIVE PRUITT questioned why the AJC members from the Alaska Bar Association have the ability to set aside any predispositions [better than] the governor.

2:11:25 PM

MR. CARPENETI clarified that he was not saying the that the four [AJC attorney members are better at setting aside predispositions] but rather that a balance is maintained so that no one individual, the governor, has the power to name the individuals who determine which candidates go to that governor for appointment. Although he conceded there is a theoretical possibility in the current system for an individual to narrowly define interest groups in terms of attorneys versus non-attorneys, he opined that it's a false distinction. Of over 1,100 votes, 15 times the votes have been tied of which 5 times the Chief Justice ruled with the non-attorney and 10 times with the attorneys. He opined that is a remarkable record of non-occurrence and an insignificant number. He concluded that HJR 33 proposes to [change] a system that has worked very well to address the theoretical problem of four lawyers being able to dominate three non-lawyers.

2:13:38 PM

The committee took a brief at-ease.

2:14:45 PM

ROBERT FLINT, speaking as a retired Anchorage attorney, related his support for HJR 33 and adding public members to the AJC. He offered the following three reasons for his support. First, the Alaska Constitutional Convention Minutes were clear that one of the reasons for the attorney members was that they knew their fellow attorneys better than the public, and thus were in a position to pick the best. He related that when he passed the bar in 1964, there were 154 lawyers in the entire state and he knew them all by name. However, today, there are thousands of lawyers and clearly, he opined, inside knowledge of attorneys does not apply today as it did 50 years ago and if there is such knowledge it can easily be communicated to public members. Secondly, the National Lawyers Guild, of which he has been a

member for 50 years, is run with factions of plaintiff's lawyers versus insurance defense lawyers, prosecutors versus criminal defense lawyers and other factions. The common complaint about the Alaska Bar Association bar is that certain factions vote in a block for or against a particular candidate such that public members are a real benefit, he opined. He noted that public members are recruited and nominated by the governor and vetted and confirmed by the legislature. Thirdly, and most importantly the present system is undemocratic and, he opined, places control of the appointment of one of the three branches of the government in the hands of a group the majority of which is not subject, even indirectly, to the people of Alaska. "I believe that is wrong," he said. Alaska established a "whole" democratic system, not a two-thirds system, he stated. He said he could understand testimony from lawyers and judges defending their control, after all when one holds the power one can come up with good reasons to keep it. Mr. Flint said he did not understand why anyone else would object to the creation of a majority of public members [on the AJC] as that reflects the system "we say we have and want."

2:18:22 PM

KEVIN FITZGERALD offered the following statement:

> My name is Kevin Fitzgerald. I'm a life-long Alaskan. I come from a family of lawyers, my sister's a lawyer, my other sister is married to a lawyer and my older brother is involved in the legal business, which as you might imagine made dinners interesting. Presiding over all of it was my father, James Fitzgerald, who was a longtime Superior Court Judge, Supreme Court Justice, and Federal District Court Judge; and in fact there is a dedication next month for the naming of the Federal Courthouse after his name.
>
> I, whether it be a bless or a curse, depending on your perspective, I am also a lawyer, licensed since 1987 to practice law, and after a one-year clerkship I was a prosecutor for eight years before going into private practice. I am also the most recently retiring member of the Alaska Judicial Council having completed my six-year term just last month as a representative of the Third Judicial District. I am here today as a member of the public and a former member of the Alaska Judicial Council. At the outset, I would say that while I have been a member of many committees, I am

most proud of my service with the Alaska Judicial Council. Not only because of the work that's done is terribly important but because of the people, both the attorneys and the public members with whom I had not only the opportunity but really the privilege to serve.

I would say at the outset of remarks that essentially state the proposition that the merit selection process is far superior to any alternative with which I am familiar. I would also say that based on my involvement with Alaska Judicial Council, I am familiar that the merit selection process currently employed in this state is held up among other states that employ the merit selection process as a gold standard. The reason why that is the case is because, as currently constructed, the process that we employ here in Alaska strikes a brilliant balance between a variety of different interests: political, judicial, public, attorney, geographic diversity, and a process of appointment to the Judicial Council which is designed to maintain those balances in that diversity. The Judicial Council has been criticized before and it certainly will be criticized again. And, is it a perfect process, of course not - no process is. I can tell members and assure members of this committee that while I was on the Alaska Judicial Council ... there was a move to try to make the process ever more transparent, appreciating that the transparency better serves the public's understanding and the public knowledge about the process. There was a comment made by former Chief Justice Carpeneti that apparently was posed to him with regard to the federal selection process, and I was also a member of the federal selection process for a magistrate judge and can indicate unequivocally and based on first-hand knowledge that the process there is "cloaked with secrecy" in comparison to the transparent process that the selection employs or the process employs with the Alaska Judicial Council.

I believe, however that the main criticisms of the Alaska Judicial Council either manifest a misunderstanding of the constitutional mandate of the council or demonstrate a fundamental misunderstanding of how the process actually works. In other words, the complaints that I hear are almost exclusively

about the process, not about the fundamental makeup. Having said that, there appears to be of course the goal the constitutional mandate of the council is to refer the most qualified applicants to the governor from which he can select. I know of no evidence, empirically or otherwise, that would serve to demonstrate that the Alaska Judicial Council isn't adequately serving this goal. The fact is we have a judiciary we can all be proud of and which is the envy of many jurisdictions.

What I believe is contemplated in this proposal represents a fundamental shift in the balance which has served all of us so well. And by us, I mean members of the bar, the litigants that appear in court, as well as well as the general public. It appears that some of the main criticisms of the Alaska Judicial Council have already been addressed, but as I understand one of the stated reasons; and I appreciate having said that there may be all sorts of unstated reasons, is that attorneys dominate the council. And I believe, frankly, that is borne out by naivety as certainly the empirical evidence doesn't support that. And I would expect that the public members that have served on the Alaska Judicial Council would find that kind of comment offensive because one of the parts of ... my experience with the Alaska Judicial Council is that I had the opportunity to deal and address with and confer with very smart, capable public members. Not to violate the deliberative process, but there is not a shrinking violet among any of the people that I served with. And I found myself re-evaluating my own position repeatedly based upon the insightful comments and remarks that were made by the public members.

The other criticism that is leveled against the Alaska Judicial Council with regard to how it's currently constructed is that it's not geographically diverse enough. And I believe that the current composition does, in fact, provide due consideration to area representation. Both the public members and the attorney members are all drawn from different judicial districts and the manner in which they are appointed is designed to maintain that important balance. I would add that with regard to the position that is being sought to be filled, it is after all a judicial position and who better to determine who is among the

most qualified than the attorney members who have the most knowledge, including first-hand knowledge about the applicants. The Constitutional Convention language, I believe it was Representative McLaughlin actually made a comment when this very similar issue was addressed, and he said, "The intent of the Missouri Plan was to give predominance in the vote to professionals who know the foibles, defects and qualifications of their colleagues." In short, the council as currently comprised provides constitutional due consideration to area representation without regard to political affiliation. While a fourth public member might be added, you would have add an additional attorney member to be added in order to maintain the very delicate balance that's so important and integral to the process as a whole. I would note that ... the only Judicial District that is not currently represented is the Second Judicial District and at some point, frankly, it becomes a logistical and administrative headache. Nor am I aware that the Second Judicial District is not otherwise being ably represented by other members of the Alaska Judicial Council. As a result, the Alaska Judicial Council in design and in actuality is a representative body. Those will conclude my remarks unless there were any specific questions. And I thank you for allowing me to share mine.

2:27:37 PM

MICHAEL PAULEY, Alaska Family Action (AFA), paraphrased the following written remarks, a copy of which is contained in the committee file [original punctuation provided]:

Thank you, Mr. Chairman, members of the committee, I'm Michael Pauley. I'm representing Alaska Family Action, which is the legislative advocacy arm of the Alaska Family Council.

Our organization supports more public involvement in the process by which we select, evaluate, and retain judges in Alaska. We support the goal of House Joint Resolution 33, which would increase the public's decision-making authority in that process.

No person can serve as a judge or justice in Alaska without first being nominated by the Judicial Council.

This concentrates an awesome amount of power in the seven members who serve on this panel. In fact, they have more power than any other single entity to determine who will hold the reins of power in one of our three branches of government.

If we look at other states, there's a wide diversity in the number of people who serve on judicial nominating commissions:

Colorado: 16
Arizona: 16
Florida: 9
Utah: 8
Iowa: 15
Oklahoma: 15
Tennessee 17

So, the proposal in HJR 33 for a 10-member Judicial Council is hardly radical or untried, and it's certainly mainstream as compared to other states. It's also important to note that the population of Alaska has at least tripled since the time of statehood, and the court system has grown along with it. Creating a larger Judicial Council seems appropriate as well, given its expanded workload and responsibilities.

But beyond the issue of the total membership on the Council, there's also a very crucial issue concerning what the proper balance should be on the Council between members who are there representing the interests of the state Bar Association vs. those members who are representing the general public.

Those who defend the Judicial Council's existing structure argue that it's perfectly balanced by having 3 attorneys and 3 public members. We strongly disagree with that view.

The attorneys on the Council are selected by the Board of Governors of the Bar Association – an entity with 4,212 members. They get to choose half the regular voting members of the Council, and they constitute ½ of 1 percent of the population of this state. The three public members are there to represent non-attorneys – the other 731,000 Alaskans who are served by the Court system. Whatever one might call this

system, it's not balanced. It shifts enormous power away from the general public and concentrates it in the hands of those who make a living practicing law in front of judges.

It's also important to remember that the Chief Justice is a dues-paying member of the Bar Association, and so in reality the Bar members have a majority of four of the seven seats on the Council.

Now some former attorney members of the Council have stated that they feel like they were representing all Alaskans, not just the Alaska Bar Association. That is an admirable sentiment – but the fact of the matter is that the Board of Governors of the Alaska Bar Association has exclusive control to determine which members of the Bar serve on the Council. This cannot be emphasized enough: The Bar members of the Council are NOT appointed by the Governor, and they are not required to be confirmed by the Legislature. In contrast, the non-attorney public members must appear before the House and Senate Judiciary committees, where they can be questioned and grilled about their backgrounds, their political beliefs, anything. But meanwhile, the Bar members – most of whom are skilled trial lawyers – get a free ride, and don't have to go through this occasionally tough process.

This is different from how we structure other commissions in government. We of course recognize that we should have physicians on the state Medical Board. But we don't let the Alaska State Medical Association appoint them! The Governor appoints the physician members AND the public members, and they both have to stand for legislative confirmation – doctors and lay people alike, they all get treated equally. The same holds true for the Board of Nursing and the Board of Pharmacy.

One reason we support adding more public members is that it will provide a valuable check on the ability of Bar Association members to vote as a bloc to prevent clearly qualified judicial applicants from being nominated for the Governor's consideration.

There have been five notable examples in just the last two years where all three public members of the

Council voted YES to nominate a particular applicant for a judicial vacancy, but all the participating attorney members voted NO. In each of these cases, the Supreme Court Justice sided with the attorneys and voted NO – thus acting to defeat the nomination and shorten the list of nominees that would be sent to the Governor.

What is stunning is that three out of these five votes occurred with respect to vacancies on the Supreme Court. And so we have this unseemly situation where the Chief Justice's NO vote is directly influencing who will be chosen to sit with him or her on the High Court. The potential of the Chief Justice in these situations to alter the future philosophical direction of the Court is undeniable.

I'd like to discuss just one example of these split votes between public members and attorney members, because I think it speaks volumes about what is broken in our current system.

In June of 2012, the Council met to consider the vacancy created when Justice Morgan Christen left the high court. The Council had to vote on a very distinguished group of 12 applicants. The pool of talent included: one judge from the Alaska Court of Appeals; three judges from the Superior Court, one each from Fairbanks, Palmer, and Anchorage; and two administrative law judges, one from Anchorage and one from Juneau. Incredibly, not a single one of the candidates with prior judicial experience was nominated for the Governor's consideration.

Instead, out of this distinguished field of applicants, the Council chose to nominate just two individuals. One was an attorney in private practice who also happened to be a member of the Board of Governors of the Alaska Bar Association – the same group, of course, that selects the attorney members of the Council. The other nominee was the former director of the Alaska Legal Services Corporation.

On June 26, 2012, the Alaska Dispatch ran a story about these two applicants that the Council nominated to the Supreme Court.

The reporter, Amanda Coyne, decided to look at the political views of the two nominees. Among other interesting details, she reported that one of the nominees, Mr. Peter Maassen, was a registered Democrat and a contributor to numerous liberal candidates and causes. She also reported that the other nominee, Mr. Andrew Harrington, was registered as non-partisan, but was formerly a member of the ACLU.

Now, as a member of the public, upon reading this, you might naturally conclude that out of a field of 12 applicants, the Council had chosen to nominate two attorneys with left-of-center political views to the Supreme Court. Is this a problem? As a representative of a conservative political organization in Alaska, my answer may surprise you: No, it's not a problem that the Council chose to nominate these gentlemen.

Very few would doubt that both of these gentlemen possessed the qualifications to serve on the Alaska Supreme Court – but surely not to the exclusion of the many other qualified applicants with distinguished careers and prior judicial experience. The scandal here is not about who WAS nominated, it's about who WASN'T nominated. It's not the Judicial Council's job to nominate only liberals or only conservatives, it's the Governor's job – as an elected official – to weigh those subjective factors in a nominee.

Now, some of the more strident critics of HJR 33 have made the rather unflattering charge that the goal of this amendment is to allow the Governor to appoint political hacks to the Council, who will nominate only applicants to his liking, so the Governor can stack the courts as he or she wishes.

My argument would be: if you want to look at how future gubernatorial appointees might vote, your best yardstick is to look at how the past ones have voted. Let's look at the June 2012 vacancy on the Supreme Court as an example. At that time, on the Council, there were two public members on the Council appointed by Governor Palin, and one appointed by Governor Parnell. So how did these three Republican appointees vote on the two rather liberal nominees to the Supreme Court? Well, the answer is, that in the case of Mr. Maassen, all three Republican appointees to the

Council voted YES to forward his name to the Governor. In the case of Mr. Harrington, two out of the three Republican appointees voted to forward his name to the Governor. So the evidence shows that the public members were being inclusive in who they chose to nominate.

But in stark contrast to this, there were three different cases in 2012 alone, where the public members voted unanimously to nominate certain applicants to the Supreme Court, while the attorney members, including the Chief Justice, voted as a bloc to prevent these applicants from being considered by the Governor. In all three of these cases, the dispute did not concern an applicant who was some "crazy right-wing activist," instead the applicants were sitting Superior Court judges who had already gone through previous vetting, and approval, by the Judicial Council. These were currently serving judges who were passed over, not crazy activists or substandard attorneys.

We believe that HJR 33 is a proposal that is consistent with this constitutional heritage, and we urge your support of this measure.

Thank you very much.

2:38:28 PM

ELEANOR ANDREWS offered the following statement:

I currently live in Anchorage. I have lived in Juneau, serving in the Sheffield Administration as Commissioner of Administration. I have also lived in Fairbanks.

I was a member of the Judicial Council from 2001 to mid-2007. First of all, I want to say that it was probably the most beneficial public service I have ever been involved in. I was amazed at how many people are willing to give up days of their time without compensation, traveling to inhospitable places, maybe for the lawyer members not earning fees those days. I was a business owner when I did it and I felt like it was my duty to help the governor pick the most qualified people to serve on the bench.

There has been a lot of speculation from people who have not served on the council about how we get together to decide who is going to go forward and who isn't. I will tell you that the people that we have sent, when I was on the council, were the most thoroughly vetted individuals for any position I have ever been involved with. We checked their credit, we checked their family history, we checked whether they've got DUIs or any other kinds of criminal problems in their past. We reviewed their writing samples and I'll tell you, a lot of the people, I'd say that 25 percent, would have failed on an essay contest in high school. So, we check a lot of things and the most important thing we do, when they've asked for a private interview, is to really delve into their judicial temperament. I'd always ask have you ever had any contact with the majority of the people who are going to come before the court. ... whether they were Republicans, or Democrats, Liberals or Conservatives. We were looking at their ability to analyze, to empathize, to get along with other people. We also reviewed comments from their peers who appeared with them in court, comments from judges, comments from people who are judicial court watchers who sit in court and see how the judge conducts himself. I just want to say that for the six years I served, there were two times that governors did not want to select from the panel we sent. One was Governor Knowles and the other was Governor Murkowski. Governor Murkowski took the position once because the person that he personally supported was not sent forward, that we should send every applicant who met the Constitutional requirement, which in that pool meant 31 people.

So I think that we've got a system that over time has proven to work. I'm sure there are anecdotal problems that people have and want to be fixed but I don't think changing the composition of the council is going to help that because no matter what agenda people walk into that meeting with ... I'm talking about council members, by the time we listen to our peers, whether they were attorneys or not, we understood we were looking for the same thing, the most qualified people. And I felt that in all cases except for one, we sent the most qualified. There is always a very clear break from those that are unacceptable, those that are

just okay, and the most qualified. And I don't think that changing it is going to make any difference. I never had any instance where I felt, or my other lay people felt we were intimated by the lawyers. In fact, I think they tend to talk and go so long around the bush that often they lost their point. So, I would urge you to keep the council as it's currently constituted. And if people want things like more geographic representation, you don't have to change the number of people just choose them from different areas. And I also want to say one thing about the lawyers who serve, there's not a whole group of lawyers out there that are willing to sacrifice themselves and give up the time that it takes to be on the council so they draw from those that have a sense of public service and I thought that they all handled themselves professionally and without bias.

2:43:29 PM

BILL GORDON offered the following testimony:

I've lived all over the state. I am a lifelong Alaskan. I served three different governors in various positions regarding judicial selection so it's over a span of 40 years. I served with the governor's office actually vetting council nominees for the governor and now am currently serving on the [Alaska Bar Association] Board of Governors as the current governor's non-attorney member of that association. I've also served a six-year period on the Alaska Judicial Council.

The area I'm going to weigh in on today ... is that when some have characterized deliberations during the nomination procedure as a sort of a dance weighing the interests of non-attorneys against those of the bar. And, I just have never found that. I've always found that the attorneys were public members first who had the same concerns that the non-attorneys did regarding the qualifications as set forth in the criteria the council uses to make these nominations. In fact, most of the nominees that we sent out during the six years I've been there would be considered to be in the top tier, the most qualified of the bunch. ... I think every time I was there they were unanimous. And I think that is true of most of the other times too.

The only time we had these different votes where the Chief Justice may have to weigh in or there might be an attorney member voting with some of the public members was when we got to the periphery of the candidates who didn't quite measure up to the top level candidates and we were trying to either move them up or move them down. There would sometimes be a difference of opinion, but I want to assure and re-enforce that the people who would have gone out of the council at the top tier were almost always unanimous choices of both the attorneys and the public members ...

Some have also speculated why some obviously qualified applicants haven't been selected. I heard a person talking about that earlier, not selected among the most qualified and I don't think that speculation would change by the addition of any number of new public members, whether they be attorneys or not be attorneys. The decision of the council on each judicial nomination may not be supported by all and undoubtedly it won't be, but the process is set up to nominate for the governor's consideration only those people that the framers called "the best timber." And, I can assure you that those people who were sent up were always that from among the group we looked at.

Let me finish here by saying, I am unabashed partisan Republican. ... I'll tell you right up front, I have worked many times on many, many Republican campaigns, including governors. Three times successfully in many local races and I've got lots of conservative friends and ... there is a perception among them that the process is biased in favor of one particular political persuasion over another. Some say the bar members tend to be more liberal than the population in general and frankly, that is also my perception. But I can honestly tell you that during my six year term and my many months of meetings with the bar members with my time on the council and my time on the Bar Association Board of Governors, I have never heard an attorney or non-attorney member ever argue or promote a political bias for any of the candidates. To do so is strictly outside the published criteria of the council and it just doesn't happen. Some apparently seem to desire to change this process to make it more manageable to effect the results to their favor, I guess. In my

opinion what we are attempting to accomplish by HJR 33 and the committee substitute effectively places the governor, once again, in total control of not only the nomination process but also the appointment process. Where the framers envisioned a situation where the ... the professionals were also members of the public and the political appointees would work to find consensus. And some seem to want to apparently tip the balance to the political and I think that would be a big mistake.

In conclusion, under HJR 33 the philosophy of occupying the governor's office, whether liberal or conservative, could effectively have political control. As a conservative myself I would be very comfortable with judges nominated and appointed by a likeminded governor. But, I'm really not. I just don't feel that this process is set up that way. Justice isn't liberal or conservative; it's not left-wing or right-wing. Justice isn't about politics and it shouldn't turn with the political tides. Justice should be a safe harbor that we all seek whatever our politics when we find ourselves in the storm of controversy. The proposed amendment doubling the governor's appointees effectively eliminates the balance and vision by the Constitutional framers, and in my opinion, would destroy the merit selection system as we now know it. That would be a tragedy and I urge you to vote against it.

Thank you Mr. Chairman.

2:50:22 PM

FRITZ PETTYJOHN stated he is testifying as a member of the Alaska Bar Association for the last 40 years, and is in agreement with all of the remarks put forward by Robert Flint and Michael Pauley. In particular, he expressed agreement with Mr. Pauley's comment that the scandal is not really who gets nominated, but who does not get nominated. He added that the previous testimony was "spot on." He then said it appears to him there is a conflict of interest between the two views of the judicial system. One is a rather expansive view in which individuals believe there are many constitutional issues, and therefore they can ignore what the legislature says because the individuals are interpreting the Alaska State Constitution, which trumps the law. Other individuals have a more restrictive view of the judicial role as these individuals want to be very

careful before they resort to an constitutional argument and impose their will on the prerogative of the legislature. He expressed that based on his experience this philosophy is the philosophy of the Alaska Court System, "the more activist" philosophy. He explained that the conflict arises when individuals are not inclined to go along with [the activist] philosophy as it makes them uncomfortable. He suggested that the public is probably more in line with the more restrictive view of the role of judges in Alaska's society as opposed to the rule that lawyers have of [the role of judges]. In conclusion, he stated he has been in California for the last 13 years as regretfully left for family reasons and noted that he still votes. "I still have a say on who is on the Alaska Judicial Council," but legislators and citizens do not, which appears to be "outrageous" to him and completely undemocratic. The system, he opined, would be improved with HJR 33, and thus he encouraged the committee to support it.

2:53:16 PM

MIKE COONS paraphrased the following written remarks [original punctuation provided]:

> I fully support HJR 33 and HB 200.
>
> As a voter, there is so little solid information on Judges. Over the years, the information from the Judicial Counsel has been lean and not helpful in helping me to make an informed decision on voting.
>
> This amendment puts more citizens than lawyers in the counsel who hopefully will add a better level of evaluation and scrutiny of the Judges, their history of decisions, how they sentence criminals, either lightly or heavily, etc. Criminal behavior and the resulting punishment must be deterrent vs the views of many on the left that prison is a place to learn to behave in civil society. I will vote, if I know any Judge who is lenient, the problem is the Counsel is mute on this issue.
>
> Lastly I want to know if a Judge is following the Alaska Constitution and the US Constitution or is legislating from the bench. Those who legislate must be voted out. I do hope that my fellow citizens on the Counsel will let us the voters know whom these judges are.

I'm not asking for a "Hanging Judge" evaluation of the Judges, but I do want some clear history of what these judges are doing and frankly I do not believe a counsel like we have now is doing that with the lawyers making those determinations vs citizens.

Lastly, we must have a counsel that will follow the law itself and not endorse Judges. All I want is the information and I'll decide if Yes or No. Just for clarification, just about all my votes for all Judges because of poor information have been No.

2:56:51 PM

NANCY MEADE, General Counsel, Administrative Staff, Office of the Administrative Director, Alaska Court System, offered the following statement

I think at the outset I ought to address the comments that were made at the beginning of the hearing about the court system's role here. As you know, we don't usually oppose or support any bills. We are neutral with respect to nearly all the bills and resolutions that come before the legislature, and there is good reasons for that. The court respects the separation of powers and recognizes that policy determinations and substantive law changes are completely up to the legislature. Our role is to implement those laws that you pass and to perhaps build procedures around those laws. My role here in the legislature as the liaison, if you will, is to help make laws that are ... that can be implemented and to try to make sure that things that do get passed are not going to cause problems. I provide data, I provide information about procedures, etc. For this resolution, I have gone on record as saying the court is opposing this. I said that in the other body shortly after HJR 33 was introduced, I spoke to many of you and your staff ... the committee staff, and made that clear. So the court has decided to oppose that bill. That, as I say, is very rare. I was directed to do this by the Supreme Court. I was not at the meeting where the issue was discussed, but I learned that that was what I was to do, and that is what I am doing. Now why they might have opposed it, I have assumed that it is because as former Chief Justice Carpeneti explained, when a bill or resolution

has the potential to directly impact the administration of justice that's a situation that the court wants to, and needs to get involved in. And, therefore, my assumption is that the Supreme Court, at least, believes that this directly impacts the administration of justice. How? We, the court system depend very much on the work of the Judicial Council. We are not the Judicial Council. I've never been in the Judicial Council's offices, I don't know the names of many of their staff, but the court appreciates, and needs, and leans on, the work that they do. Both in screening judicial applicants and the other piece of their work that's very important to the court is making recommendations during retention cycles. Because this is so important to the court is the reason that the court is opposing it. And, again, why? Because the resolution has the potential as others have testified to, to change the quality of the judges on the bench. It has the potential to change the focus on merit selection and the focus on qualifications that has been the hallmark of judicial selection up through now. There's been some questions about why that could be, just simply adding more public involvement sounds like a innocuous or a valid thing to do as the state has grown. Well, again, as it has been alluded to by other testifiers the potential for changing the dynamic of the council when you have a majority of members who are governor appointees is great. That is, up through now, currently we have three attorneys and three public members. As you've heard and I won't go through the vote tallies again, it's been not divisive, it has not be factious, it has not been attorneys versus non-attorneys in more than a handful of votes. But, if you have a majority of governor appointees who happen to be of a like mind and happen to be appointed by somebody who has a certain political philosophy, which of course the governor would have, then the potential is those ... that group, for example, six or under the CS five, could exclude the views of the attorneys. The attorneys are on there, if you look at the Constitutional Convention minutes and even if you don't look there, the reasonable presumption is the attorneys are on there because they're aware of other attorneys that they've worked with or against qualifications. They know their writing skills, they know how they can control a courtroom, they know how

they can be emotional or not during difficult cases, they know what type of judge they would be. Now the public members, of course, have a very valid role. Again, I'm going to stress that the court system wants to see balance. We could ... if you want more public involvement it would be fine to have four public attorneys ... or four public members and four attorneys, or five and five. That is not a problem. You want more diversity, that's easy to write into a statute or the constitution. But, the issue, and I again wasn't at the meeting, the issue that has the potential to impact the administration of justice is to have six members that would be answerable or accountable to the governor choosing who gets to go to the governor. I ... and ... I just want to address directly the comment you made at the beginning about being frustrated and I haven't seen the email and I don't know what that email is. As the committee knows, I am the spokesperson for the court system when it comes to bills and resolutions. I am fairly positive I wasn't copied on that email, but since it is public that the court is opposing it ... there ... we have had people call and say how do I get involved, what do I do, what time is it going to be heard, what number do you call? There is somebody who is helping with that effort to coordinate some of the testimony, and I believe that that is not just justifiable, but probably good practice. When an entity is opposing a piece of legislation to help ensure that we don't have duplication or ... just like supporters of legislation, probably if this resolution ensures that certain people know when things are going to be heard. And, I ... again, I haven't seen the email but I would just submit that it isn't improper in any way for somebody at the court to help field those phone calls when we are on record for opposing the resolution. Okay ... I want to go on to one point ...

3:03:33 PM

MS. MEADE responded to Chair Keller that she has several points she would like to make and could come back.

I'll kind of quickly then hit the point that I don't think has been given enough stress and that is the Judicial Council's role in retention. And the Judicial Council does assess and review the work of

current sitting judges and then make recommendations that presumably many voters rely upon. It comes out in the election pamphlet. Well, one of the ways that this resolution has the potential to harm the administration of justice is that if a sitting judge is faced with a case that is controversial and has the state on one side ... say the governor on one side, whether it is an oil and gas case, whether it is a subsistence or land rights case, whether it is an environmental case, the judge is faced with the decision of voting in favor of the governor's position or the other side's position. Now if the ... that judge votes in favor of the governor the real potential exists under this bill that the governor's appointees could come out with a no recommendation for that judge. That judge could have the view that it's hard to be impartial. Litigants in front of that judge could have the view that it is hard to get an impartial decision maker with that, at least, threat there that if the decision doesn't favor the governor's position there might be consequences. Now this is something that is just a potential under the bill but I feel that it would impact citizens, companies, corporations, everybody's view of how impartial their judge is if they felt that the judge could be removed or get the no recommendation and lose their job if their decision isn't the way that a party thinks it should be. One last point, we have over 70 judges in this system, our judges come from all different backgrounds. There is a view, I believe, that persists that judges aren't liberal and it has been said in other committees by some of the testifiers that there ought to be a little bit more conservatism on the bench. I want to say that we have dozens of judges that came from the district attorney's office prosecuting people, we have several that came from the public defender's office, we have many who have defended insurance companies, many who have defended oil companies, many who have worked with children and families on all sides of the issue. Out of those 73 judges we have people who list, on our web site where there is a link for ... about the judges, as their hobbies: fishing, flying, athletics, boy scouts, and church related activities. We have people ... judges who have gone to public universities, private universities, law schools affiliated with Christian groups; we have every array of judge on the

bench. Now could I say that some are conservative and some are liberal, I honestly don't know, but with 73 judges with the array of the varied backgrounds and the varied experiences and hobbies, I would submit that they aren't too far from the rest of your constituency. So, I know that you are in a hurry, I will wrap up and if you have any questions I would be happy to answer them.

3:07:23 PM

REPRESENTATIVE PRUITT questioned whether the Alaska Court System would potentially be in favor of any sort of change to the AJC.

MS. MEADE responded that although she would need to discuss the specific change with the Supreme Court, she opined that the Supreme Court would be open to some change. For example, there has been talk about geographical diversity as the Supreme Court strives for diversity on its bench in terms of cultures, backgrounds, and all sorts of areas. She related her impression that the Supreme Court would not oppose legislation requiring more geographic diversity among AJC members. Again, increasing the size of the AJC is in and of itself not something she would oppose as long as the balance was maintained, she explained. Other ideas, such as fewer issues being confidential, more public involvement in hearings and in other areas, and more invitation for public comment would be fine, she noted. She related her understanding that the Supreme Court would be open to improving the process and would welcome more public participation in the process rather than trying to stop participation.

3:09:01 PM

MS. MEADE, in response to Chair Keller, explained that when legislation appears to her to be important, she brings it to the attention of the Supreme Court and her two immediate supervisors, Administrative Director Christine Johnson and Deputy Administrative Director Doug Wooliver. In this instance Ms. Meade sent an email advising the Supreme Court that it should know about HJR 33. She then received direction from her immediate supervisor, Deputy Administrative Director Doug Wooliver who had met with the Supreme Court and the Administrative Director [Christine Johnson] in a closed meeting as it was viewed as part of its deliberative process. She was then advised to oppose HJR 33.

CHAIR KELLER, noting that Ms. Meade has always been a reliable source of information from the court system confirmed that Ms. Meade was not copied on the email he mentioned earlier.

3:10:56 PM

REPRESENTATIVE GRUENBERG asked Ms. Meade whether she had completed her testimony or preferred to return at the next meeting.

MS. MEADE responded that she would leave that to the will of the committee and that she would put her comments in writing.

3:11:58 PM

SUZANNE DiPIETRO, Executive Director, Alaska Judicial Council, stated that the AJC has not taken a position, either supporting or opposing HJR 33, and her role in the process is to offer information about what the AJC does and why. She reminded the committee that one of the AJC's important constitutional duties is to conduct studies to improve the administration of justice. In that manner, the AJC can be of assistance to the legislature on such issues, as recidivism, sentencing, alternative dispute resolutions, whether certain programs are cost effective, and whether mediation results in more agreements than litigation, she explained. She referred to the constitutional structure wherein there is a merit selection system, but pointed out it should be considered that Alaska has a merit selection and retention system as the legislature cannot consider the selection of judges until considering the retention of judges. She explained that the founders conducted a vigorous debate regarding Article 4 and considered two options that had been used for selecting and appointing judges. The two options were the popular election and the option of gubernatorial/presidential appointment. The framers decided that the election process suffered from the fatal flaw of making judges beholden to political parties' service, while the appointment structure suffered from the fatal flaw of choosing lawyers who have close personal relationships with the governor. Therefore, that the framers chose a middle [road] which is the merit selection and retention system. Ms. DiPietro opined that the framers intended for the AJC to be a small select group that would work hard, engage with each other, determine the best candidate available, and forward those names to the governor rather than to be a representative body. She further opined that it is not a fair criticism of Alaska's current system to say that the Alaska Judicial Council is not representative

because "that is just not the purpose, at least according to the founders."

3:15:59 PM

MS. DiPIETRO reminded the committee that the Alaska Bar Association Board of Governors is state sanctioned and actually controlled by the legislature, as the legislature authorizes the Alaska Bar Association. Although the Board of Governors does appoint, it does so after an election that occurs among the attorney members. She informed the committee that the AJC has had the following four Alaska Native members: Vicki A. Otte, Leona Okakok, Gigi Pilcher, and Mary Jane Fate. She then referred to documents in the member's packets briefly depicting the way the council's decision making comes out. Alaska Judicial Council members have a remarkable rate of agreement and votes are either unanimous or unanimous but for one vote 81 percent of the time. With regard to instances when the Chief Justice votes, she related that the Chief Justice has voted 68 votes of the 1,136 votes, which is 6 percent of the votes. When the Chief Justice is called upon to vote, 75 percent of the time the name in question is forwarded to the governor. She noted that within 73 percent of vacancies, the AJC has forwarded more than the minimum of two or more names to the governor. She explained that statistically, but not always, a fewer numbers of names go up on rural judgeships where there may only be two or three applicants. She remarked that it is important to understand that when the council is voting on candidates to send to the governor, it is looking for the very best people and not the middle of pack applicants. Sometimes stronger candidates show up and an applicant could drop from the top candidate to the bottom, she opined.

3:19:38 PM

MS. DiPIETRO referred to a chart, within each committee member's packet entitled "AJC Judicial Nomination Votes over Time" that depicts the number of votes taken by the council, which fluxuates depending upon the number of vacancies and number applicants for each vacancy. She noted that the last couple of years AJC has been busier voting more than at any time in its history. She referred to the 5 Chief Justice votes in the last 2 years that have been criticized, she expressed that it should be taken into context as it was 5 out of several hundred votes. She explained that the chart depicts that where the total votes spike, the Chief Justice votes flip up a bit also. She opined it would be worrisome from a statistical standpoint if the total

numbers of votes of the council were pointed straight down and the Chief Justice's votes were pointed straight up. However, that is not the case, she stated.

3:21:21 PM

MS. DiPIETRO explained that the majority of other state nominating commissions [in the United States] have equal numbers of attorney and non-attorney members for all of the reasons previously stated. There are some commissions that have more lawyers than non-lawyer, and a handful that have more non-lawyers than lawyers as HJR 33 proposes. She asked the committee to consider that four of the five that have more non-lawyers than lawyers have a restriction on political party affiliations. For example, Arizona, which has been cited as a possible model for Alaska, does have ten non-lawyers and five lawyers, but no more than five of the non-lawyers and no more than three of the lawyers can be of the same political party. She noted that is not Alaska's system as the AJC is without regard to political affiliation.

3:22:14 PM

CHAIR KELLER questioned if the AJC met regarding SJR 21.

MS. DiPIETRO responded yes, and added that meeting was noticed, and it did not go into executive session.

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CHAIR KELLER described a hypothetical scenario wherein had the question come up before the council whether or not to support or oppose SJR 21 or HJR 33, there could have been a split vote and the Alaska Supreme Court Chief Justice would have had to break that vote. Moreover, the Supreme Court is the entity directing the Alaska Court System to oppose [SJR 21 and HJR 33], he opined.

MS. DiPIETRO acknowledged that theoretically that could have been the case, but it did not happen.

CHAIR KELLER expressed that his scenario was a complete theory, but noted there are not that many options with six people.

MS. DiPIETRO highlighted that there is the 82 percent agreement rate of the AJC.

3:23:39 PM

REPRESENTATIVE GRUENBERG requested that Ms. DiPietro be available during the next meeting on HJR 33 and questioned if she needed more testimony time as she had commented that there appeared to be more of a turnover in judges, and he did not require an answer today as to whether there is a reason for that turnover.

3:24:42 PM

REPRESENTATIVE PRUITT questioned if the AJC may be open to certain changes, or whether the attitude is that it is working fine and should be left alone.

MS. DiPIETRO, noting that the AJC has not instructed her to take a position, but certainly anything that would cause a disincentive for the council members to engage with each other [is of concern]. For example, Kevin Fitzgerald's testimony depicted that the process AJC has seen over and over again whereby people communicate their views, which causes others to change their views and "that is the strength of our process." The engagement structurally must happen and there must be four votes to take action. She reiterated that anything creating an imbalance that would create a disincentive for true and candid engagement and deliberative process would be a shame and would cause the process not to be as good as it is right now. Certainly, increasing one each appears like an interesting idea, although the process is so intensive that the more members going around the table with an interview, the longer the interview process.

3:26:45 PM

REPRESENTATIVE PRUITT acknowledged that changing the process is a big concern for the AJC, but inquired as to the AJC's thoughts about changing the geographical [makeup], requiring the Alaska Bar Association members to be legislatively approved, or changing the number of names given to the governor contingent upon a certain number of applicants. Outside of impacting the specific process, itself, he questioned whether the council is open to discussion.

3:27:47 PM

MS. DiPIETRO replied "yes," adding that one of the AJC members has initiated those types of discussions. She explained that

some aspects could be altered by changing the by-laws, and others are set in statute or the Alaska State Constitution. She opined that the AJC is always open to improving its process. In reference to the public involvement piece, the AJC involves the public in its process more than any other nominating commission in the country as the public is involved at every step, she remarked.

3:28:55 PM

KEN FISCHER, representing himself and no other entity, related that he is viewing HJR 33 from the perspective as a six-year member on the University Of Alaska Board Of Regents. In order for the committee to remember his testimony he offered an acronym for "B O A T." "B" is for "B"etter as HJR 33 would add the number of non-attorneys to seven, or nine, or eleven, which is his recommendation as it would allow more robust deliberations. There are eleven regents on the Alaska Board of Regents, he explained, which ensures robust exchanges on many policy issues even though all have been appointed by Republican governors. "O" is for "O"pportunities for more Alaskans to have a real meaningful impact in the state. He reiterated that the Board of Regents has eleven members consisting of members from various areas in Alaska. He said he was astonished by several of the assertions made by Mr. Carpeneti, a former Chief Justice, including his statement "I don't think we have an attorney dominated system. I think that we have a system that is evenly balanced." However, Mr. Fischer remarked that four is not even to three. He opined that the former Chief Justice was participating in a public debate as the chief witness for the opposition. Mr. Fischer noted his agreement with Mr. Carpeneti's statement "The governor's appointment to the council would represent the governor's point of view." He recalled that Mr. Carpeneti attributed the characteristic of human nature to the government, such that the governor will appoint an individual with his/her world view. He highlighted, however, that the public can hold the governor accountable. Mr. Fischer opined that Mr. Carpeneti refused to acknowledge that the people who are the opponents of HJR 33, the Alaska Bar Association, have human natures as well. Just as four is not even to three, human nature is with everyone. Within the debate it should be acknowledged that everyone has their own perspective and an individual does not come in with a "clean slate". The framers built structures in the nation's founding document to hold government accountable, checks and balances, he explained. In fact, the United States Constitution specifies that all bills raising revenues must originate from the House of

Representatives because the founders wanted to hold those people accountable because they are elected every two years. He said that within the Alaska Constitutional Convention debates, the idea requiring selection for the AJC members came from the Alaska Bar Association and the makeup of that committee was five attorneys and two non-attorneys. At the Alaska Constitutional Convention a consultant was hired to review the document and the consultant determined that within the AJC sections " ... these sections in particular however go a long way toward withdrawing the judicial branch from the control of the people of this state and placing it under the organized bar. No state constitution has gone this far in placing one of the three coordinate branches of the government beyond the reach of democratic controls. We feel that in its desire to preserve the integrity of the courts the convention has gone further than is necessary or safe in putting them in the hands of a private professional group." "A" in the B O A T is "A"ccountabilty of which, in the process, is the legislature and the governor. "T" is for "T"rust as the last letter of the analogy of B O A T. Trust that the people who will be in the deliberations in the [AJC] will make correct decisions, as they will be from multiple parties, he opined. People want what is best for Alaska. He concluded by stating his strong support for HJR 33 as it's a good government policy.

3:39:25 PM

CHAIR KELLER removed his objection to the motion to adopt Version U.

3:40:22 PM

There being no further objections, Version U was adopted and before the committee.

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:41 p.m.