

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

February 26, 2014

1:34 p.m.

MEMBERS PRESENT

Senator John Coghill, Chair
Senator Lesil McGuire, Vice Chair
Senator Fred Dyson
Senator Donald Olson
Senator Bill Wielechowski

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

SENATE BILL NO. 136

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

- SCHEDULED BUT NOT HEARD

SENATE JOINT RESOLUTION NO. 21

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.

- MOVED CSSJR 21(JUD) OUT OF COMMITTEE

CONFIRMATION HEARINGS:

Select Committee on Legislative Ethics

Christena Williams - Alternate public member

- HEARD AND HELD

Select Committee on Legislative Ethics

Janie Leask - Public member

- SCHEDULED BUT NOT HEARD

PREVIOUS COMMITTEE ACTION

BILL: SJR 21

SHORT TITLE: CONST. AM: MEMBERSHIP OF JUDICIAL COUNCIL

SPONSOR(S): SENATOR(S) KELLY

02/10/14	(S)	READ THE FIRST TIME - REFERRALS
02/10/14	(S)	JUD
02/14/14	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/14/14	(S)	Heard & Held
02/14/14	(S)	MINUTE(JUD)
02/17/14	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/17/14	(S)	Scheduled But Not Heard
02/21/14	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/21/14	(S)	Heard & Held
02/21/14	(S)	MINUTE(JUD)
02/24/14	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/24/14	(S)	Heard & Held
02/24/14	(S)	MINUTE(JUD)
02/26/14	(S)	MINUTE(JUD)

WITNESS REGISTER

JUSTICE WALTER CARPENETI (retired), representing himself
Juneau, Alaska

POSITION STATEMENT: Testified in opposition to SJR 21.

SUSANNE DI PIETRO, Executive Director
Alaska Judicial Council
Anchorage, Alaska

POSITION STATEMENT: Answered questions related to SJR 21.

SENATOR PETE KELLY
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Sponsor of SJR 21.

CHRISTENA WILLIAMS, representing herself
Ketchikan, Alaska

POSITION STATEMENT: Appointee to the Select Committee on
Legislative Ethics.

ACTION NARRATIVE

1:34:18 PM

CHAIR JOHN COGHILL called the Senate Judiciary Standing
Committee meeting to order at 1:34 p.m. Present at the call to

order were Senators Wielechowski, Olson, Dyson, and Chair Coghill.

SJR 21-CONST. AM: MEMBERSHIP OF JUDICIAL COUNCIL

1:35:03 PM

CHAIR COGHILL announced the consideration of SJR 21. "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." [Version N was before the committee.]

1:36:29 PM

WALTER CARPENETI, retired judge and former chief justice representing himself, thanked the committee for taking so much time on such an important issue. He said he would make three points regarding SJR 21: 1) there is no demonstrated need for a change; 2) the present system balances the competing interests and extreme care should be taken before changing that; and 3) the proposal creates problems that are worth considering.

With regard to no demonstrated need, he stressed that the Alaska Constitution is widely respected. It has been amended just 28 times and a lot of those were technical. He said he looked to the sponsor statement to find out why the sponsor was proposing this and he didn't think it was any reason at all to say that a number of other states do this. He urged the committee to instead look for positive reasons to make a change.

The second reason stated was that the state is growing. That's true, he said, but the size of the legislature hasn't increased and that's not a specific reason that demonstrates a problem with the present system.

He said the third reason was regional diversity, and he didn't understand that because the constitution already requires governors to make appointments with due regard for regional diversity and the governors do that.

The fourth reason was to reduce the likelihood of tie votes, but the facts belie the importance of that. First, tie votes happen infrequently and the instances when all the public members were on one side and all the lawyers on the other side only occurred in about one percent of the votes. Furthermore, the chief justice has sided with the lawyers only slightly more often than when the chief justice has sided with the public members. Looking at the big picture, he said it's an unpersuasive case to

say that the system has to be changed when it's worked well for 55 years.

The final reason mentioned in the sponsor statement was to avoid conflicts of interest. He said he didn't understand that statement because there isn't any conflict of interest for a chief justice to break a tie any more than there is a conflict for a supreme court member to break a tie against a sitting superior court judge or a sitting court of appeals judge. The court's business is to review the work of those judges and sometimes they're affirmed and sometimes they're reversed.

JUSTICE CARPENETI said he didn't see that the reasons in the sponsor statement amount to a reason to change the constitution. That being said, what is really missing is a statement that the system is broken; that too many judges are being indicted for corruption or taking kickbacks. That isn't happening in Alaska. He admitted he was biased, but challenged anyone who supports SJR 21 to give a positive reason as to how the judiciary is failing.

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JUSTICE CARPENETI referenced Mr. Pauley's earlier testimony that two of the five seats on the current Supreme Court were held by people who came through a Judicial Council in which there was a 3:3 tie with all the lawyers on one side and all the public members on the other side and the chief justice voted "no." He said he looked at the vote he wasn't involved in and found that 12 people applied and four nominees were sent to the governor. He opined that sending one-third of the applicants was a good number. He said he was the chief justice who cast a tie breaking "no" vote in the other instance when just 2 of the 12 applicants were sent to the governor. He related that it was a difficult decision because the candidate that's been referenced was a qualified judge who could have done the job. In fact, that judge previously applied for a position on the Supreme Court and his name was sent to the governor.

He said the answer to why that applicant's name would be forwarded one time and not another is in the constitution. The convention delegates talked about a Judicial Council that would be made up of lawyers who knew which lawyers were good and which were bad and public members who could act as a check and give the broad every man's view. The Council was charged with sending the very best or "the tallest timber," and from that perspective it isn't inconsistent that a particular person can be among the best if that category is expanded to 7 out of 17, but that

person might not make it when there are 12 applicants and 2 stand head and shoulders above the rest.

He concluded his comments with an expression of hope that the committee would take into consideration the question of whether or not the Judicial Council has failed in the past before making a decision to change a constitution that has served so well.

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CHAIR COGHILL opined that the listening public needed to hear how the system works and that he'd been fairly generous in creating that record. He thanked Justice Carpeneti.

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SENATOR DYSON asked Justice Carpeneti to rebut the argument that the Bar Association is a collective of values that it consciously or unconsciously wants to perpetuate. That's the view of some constituents and what makes the system suboptimal, he said.

JUSTICE CARPENETI said he wouldn't defend the way all Bar Association members vote in every poll, but he would say that 99 percent of the cases that come before all the courts have nothing to do with political issues. Rather, they have to do with what the legislature meant when it passed legislation, what the framers meant when they put the principles into the constitution, and figure out how regulations fit with statutes. What lawyers want is people on the bench who are going to do their homework, read the briefs, read the statutes, puzzle it out, and not come with a prefixed idea, he said.

CHAIR COGHILL interjected that he wanted time to hear from the executive director of the Judicial Council and the sponsor.

SENATOR DYSON said a very well respected lawyer in this state who has litigated abortion-related questions has never gotten through the process and there is great concern among people who share his perspective of human rights that a warrior who has taken on those cases will never get through the Judicial Council.

JUSTICE CARPENETI suggested he look at the whole record in that case and decide whether or not he wanted an incredibly strong advocate on the bench who had taken numerous public positions on issues that come before courts all the time. He relayed that he was on the Judicial Council both times that person applied and

there was never a tie because the applicant couldn't get even three votes.

CHAIR COGHILL said his perception was that judges who have taken strong positions in support of Planned Parenthood have sailed through the process.

JUSTICE CARPENETI said he could only speak to the times he was on the Judicial Council.

CHAIR COGHILL mentioned instances in the past, including recent the testimony from a former judge who impugned some members' motives, to illustrate what causes him to bristle.

SENATOR MCGUIRE thanked Justice Carpeneti for his service to the state and apologized that he was coming before the committee when there was a time constraint. She relayed that when she commented on the legislation initially she highlighted that his tie-breaking votes were consistently on the public side, which she appreciates. She said this bill is important because there is a perception, especially in the last four years, that there has been a collective rejection of the public in the selection process. She described the proposal as a calculated way of giving the public membership more weight, and questioned what harm it could do to add more public members.

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JUSTICE CARPENETI recalled that when he broke the 3:3 tie in favor of sending the name to the governor it was because he thought in each case that the applicant fit in the group of the best qualified. The one time he couldn't come to that conclusion he voted "no." Addressing the question of harm, he said he worries about moving to a system where the knowledge, the expertise, and the experience of people who have worked day-to-day with their lawyer colleagues comes to count very little in the selection of judges. If that happens, there is a risk that what fills that place is not only people that don't know these people very well, but people who are looking for judges who are going to give a particular result.

He offered an anecdote and opined that only in a system like this where judges don't discuss their political views is it possible for two justices who worked together for a number of years not to know the answer when asked if Justice X was still as conservative as he was 30 years ago. He reiterated his belief that it's dangerous to move the political part of the selection earlier into the merit selection.

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SENATOR DYSON mentioned the case where a judge interpreted the privacy clause to give children the right to get abortions without the knowledge of their parents, and said he couldn't imagine that kind of view of the law and the constitution. He said he wouldn't call his view political, but rather a principled belief in some kind of transcendent truth.

JUSTICE CARPENETI summarized how he voted in that case and stated that he respected his colleagues who were on the other side and the process by which they got there. He reiterated his belief that the state is better off with a process that doesn't try to find out how a judicial candidate will vote because the essence of judging is to take the law that's been established by others and apply it to individual cases.

SENATOR WIELECHOWSKI asked if the Judicial Council ever asks questions about social issues such as abortion or gay rights when evaluating judicial candidates.

JUSTICE CAPRENETI answered no.

SENATOR WIELECHOWSKI asked if it would be appropriate for the Judicial Council to ask that sort of question.

JUSTICE CAPRENETI replied he didn't think it was appropriate for the Judicial Council to ask and he didn't think it was appropriate for judges to commit themselves before a case comes to them. It does a disservice to the litigants.

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SENATOR OLSON highlighted that the data he had shows 15 tie votes in the last 30 years; the chief justice joined with the attorneys 10 times and with the public members 5 times. What's even more troubling, he said, is that 4 or 5 times in the last several years the chief justice has always joined with the attorneys.

JUSTICE CARPENETI replied he would stand corrected if the number was 10 to 5 rather than 9 to 6 as he thought. For the more recent votes he recalled 3 tie votes: 2 times he voted with the public members to send a name on to the governor and 1 time he voted not to send the name on. Nevertheless, the greater point is that it is a very small percentage out of 1,163 votes, he said.

SENATOR OLSON asked if he would support amending the resolution to remove the chief justice as a voting member. If there's a tie vote the name goes on to the governor to decide. He continued to say that his real problem was that the judiciary has sent an overrepresentation of Natives to prison. Furthermore, in 55 years only one Native has served on the bench, only one public member of the Judicial Council has been a rural Native, and none of the attorney members come from a rural area.

JUSTICE CARPENETI replied there won't be Native judges until there are Native lawyers and there won't be Native lawyers until more Natives go to law school. He said the Court System has been working to get out of state law schools to set up programs in Alaska that would draw people in from the rural areas, and the Seattle Law School is now doing that.

SENATOR OLSON reviewed the pictures of currently serving judges and commented that one problem is that there's no minority sector representation. Not one is an Alaska Native.

JUSTICE CARPENETI responded that it's not for lack of trying by the Court System and Judicial Council.

CHAIR COGHILL said that shows the multifaceted element of this question. He observed that it's been represented that lawyers have a better view of the judicial system in Alaska, but he believes that the public members deserve more credit than they've been getting. He continued to say that this committee's interest is whether the system is working "with the kind of input that we would like to see from Alaska."

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SENATOR WIELECHOWSKI asked the executive director to discuss judicial candidate rejections. He offered his understanding of the October 2013 opening for the Fairbanks District Court in which three members were nominated. There was a tie and the chief justice voted against sending that applicant's name on to the governor. He said he also understands that that applicant had a lower ABA survey score than the applicants whose names were sent on to the governor. He asked if that was accurate.

SUSANNE DIPIETRO, Executive Director, Alaska Judicial Council, affirmed that was accurate. She reiterated her previous testimony that a number of performance measures are considered, but the Bar survey scores are correlated with a higher likelihood of nomination and better performance on the bench.

SENATOR WIELECHOWSKI offered his understanding of the December 2012 Alaska Supreme Court opening where two names were not forwarded and two names were forwarded. He asked if it was fair to say that the Bar survey scores for the people who were forwarded were fairly significantly higher than the Bar survey scores of those that weren't forwarded.

MS. DIPIETRO agreed that was fair to say.

SENATOR WIELECHOWSKI offered his understanding of the August 2012 Anchorage Superior Court opening. Five names were forwarded to the governor and the person who received a "no" vote from the Judicial Council had a "below acceptable" score. He asked if that was a fair statement.

MS. DIPIETRO affirmed that the applicant's overall rating was "below acceptable."

SENATOR WIELECHOWSKI offered his understanding that for the Alaska Supreme Court opening in June 2012 the same nominee received a "below acceptable" score but there was not a tie vote. There was a tie vote on another person who ultimately did not have their name forwarded; that person's ABA survey scores were lower than the two people whose names were forwarded. He asked if that was correct.

MS. DIPIETRO replied that was largely correct.

SENATOR WIELECHOWSKI offered his understanding that for the Bethel Superior Court opening in August 2012 two names were forwarded. In one case there was a tie vote and the chief justice voted in favor of forwarding the name. He asked if that was accurate.

MS. DIPIETRO answered that was correct.

SENATOR WIELECHOWSKI stated agreement with Senator Olson that he would enjoy seeing more diversity on the court. He asked Ms. DiPietro if the Judicial Council has data to indicate there is an issue with attorney and public members of the Judicial Council rejecting Native attorneys who apply.

MS. DIPIETRO said that Native attorneys represent a very small percentage of the Bar, but there is little difference between the rate at which they apply and the rate at which they're nominated.

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CHAIR COGHILL asked what percentage of Bar Association members respond to the polls.

MS. DIPIETRO explained that the Judicial Council sends Bar surveys to the mailing address of all active members of the Alaska Bar Association. She offered to follow up with the response rate.

SENATOR OLSON asked if the roughly 2,000 inactive members receive a survey.

MS. DIPIETRO offered to follow up with the information.

SENATOR WIELECHOWSKI referenced a statement in a previous hearing about defense attorneys giving prosecutors lower scores. He asked if it would be ethical and if there were many former prosecutors who were judges.

MS. DIPIETRO replied it would be unethical to give a false statement on the Bar survey, and that prosecutors are nominated at about the same rate at which they apply. She acknowledged that that statement caused her some concern so she looked and found there are about 25-30 sitting judicial officers who have prosecutorial experience.

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CHAIR COGHILL invited the sponsor to offer final comments.

[2:17:45 PM](#)}

SENATOR PETE KELLY, sponsor of SJR 21, Alaska State Legislature, Juneau, Alaska, highlighted that the former chief justice provided an anecdote and admitted he's biased because he's been in the judiciary for 30 years. The point is that there's a need to expand beyond that biased community that comprises the judicial system because it has too much sway in the selection of a branch of government, he said. He commented on his new friendship with the current chief justice and stressed that the discussion isn't about individuals, it's about a system that has a flaw. It's the job of the legislature to discuss those and perhaps make changes.

SENATOR KELLY relayed that a topic of discussion this morning in the Finance Committee was that people with felonies won't qualify for jobs on the pipeline and that there are a disproportionate number of felons in rural Alaska. Part of that discussion was how to ensure that the system isn't stacked

against these people on a project that's partly financed by the state. He said that was relevant to the current discussion because it's looking forward to help the people in the state who are disadvantaged and changing what can be changed. He opined that the Alaska Constitution appears to have a flaw and precludes rural participation in the judicial selection process. Addressing Senator Olson's observation about the number of Native or rural judges, he agreed with Justice Carpeneti's analysis. But what can be done right away is to allow rural people to at least have a say in the process of selecting judicial candidates, he said.

Addressing the observations about the sponsor statement, he said sponsor statements don't carry that much weight in the record, and he stated the intention of the resolution to this committee. Number one is the need for regional diversification and that the number of public members is too small to accomplish that. He suggested that the constitution is in conflict with itself because it says there shall be three public members and that appointments shall be made with due consideration to area representation and without regard to political affiliation. The founders didn't realize that when the state grew there would be a significant rural Alaskan voice that wouldn't be heard. The solution is to expand the membership, he said.

SENATOR KELLY reiterated his belief that voting to break a tie puts the chief justice in a conflict because the chief justice is a human being. Because the conflict can't be avoided he is proposing to make the system fairer by giving the people's representation more sway than the Bar Association. Noting the testimony last week that argued against changing the merit system, he maintained that this constitutional amendment was a very small change and it wouldn't change the merit system. He urged the members to keep in mind the people of rural Alaska when voting.

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SENATOR WIELECHOWSKI asked if he would support an amendment to the resolution to require membership from rural Alaska.

SENATOR KELLY responded that he believes the regional diversification meets that and he'd be willing to talk about it.

CHAIR COGHILL asked the will of the committee.

SENATOR MCGUIRE discussed her belief that increasing the number of public members would increase the opportunity for more diverse representation.

[2:29:36 PM](#)

SENATOR MCGUIRE moved to report CS for SJR 21, Version N, from committee with individual recommendations and attached fiscal note(s).

[2:29:47 PM](#)

SENATOR WIELECHOWSKI objected. He said a review of the constitutional minutes shows that the delegates clearly intended to keep politics out of the process, and that's why they rejected both the election of judges and gubernatorial appointments. They instead adopted a hybrid that's crafted after the Missouri Plan. A number of people are appointed by the governor, a number of people are members of the Bar Association and the chief justice votes only to break a tie. He cited the Alaska Redistricting Board to illustrate that this isn't unusual. It makes sense to have the chief justice vote in the case of a tie because that is a respected position. The reason the position is respected is because Alaska's judiciary is probably the best in the country.

He said that other states have judiciaries that are heavily politicized and the people who get appointed are either friends of the governor or they raised money for the governor. That's not how it's done in Alaska and that's not how it should be done in Alaska. He said his fear is that by weighting the Council with people who are appointed by the governor will politicize the process. The founders rejected that process and instead selected one that has worked well for 50 plus years and made Alaska's judiciary the best in the country. The system is not broken and it doesn't need to be fixed.

SENATOR WIELECHOWSKI said a review of the data shows that the system isn't broken. In the last 30 some years, 1,136 votes resulted in an even split between the attorneys and non-attorneys just 15 times. When something occurs less than 1 percent of the time that is not an indication that the system is broken, he said. That the chief justice sided with the attorney members either 9 or 10 times isn't a clear indication of bias.

He said he asked to hear from the Judicial Council today because of the hyperbole that the chief justice sides with the attorneys without a rational basis. What the record shows is that there was a rational basis for every single vote in the last five

years. The data shows that each time the chief justice voted not to forward the name, the person had scored demonstrably lower than everyone else in the applicant pool. He said this is a merit-based system, which means that the people who ultimately become judges are the best and have the highest scores. The Judicial Council said that the people who score well tend to get nominated and tend to do better on their retention scores. That's what Alaska wants and that's what Alaska is getting.

He said the comment last week that members of the defense bar reject prosecutors is false according to the testimony today. First, it would be unethical to give a rating that wasn't accurate. Second, there are 32 former prosecutors who are sitting on the bench today.

SENATOR WIELECHOWSKI said he appreciates the concern about having a fair bench that takes into consideration the concerns of people in rural Alaska and the concerns of Alaska Natives. Practically everyone would agree that there should be a more diverse Bar and a more diverse judiciary, he said, but this resolution does nothing to increase the ability to elect people from rural Alaska. That's probably why the Alaska Federation of Natives unanimously opposes this resolution. He reiterated his opposition to the resolution stating that it will fundamentally alter the judiciary in Alaska in a way that won't benefit the people.

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CHAIR COGHILL said that, as chair, he would vote in favor of moving the bill in the belief that it would give the public a better opportunity to have their voice heard. The constitution states that power is inherent in the people and giving the people the opportunity to have greater input into the selection of judges is a good thing at this time in history, he said. He rejected the notion that increasing the public membership would politicize the process. The fact that Bar Association appointments are somewhat a mystery and a bit cartel-like is further reason to support this resolution, he said.

SENATOR OLSON commented that the public has a profound mistrust of lawyers in general, and it's justified. He expressed support for amending the resolution to increase the rural representation in either the attorney or non-attorney sector, and acknowledged that was unlikely due to time constraints.

CHAIR COGHILL asked for a roll call.

[2:47:36 PM](#)

A roll call vote was taken. Senators McGuire, Dyson, and Coghill voted in favor of moving SJR 21. Senators Wielechowski and Olson voted against it. Therefore, CSSJR 21(JUD) was reported out of the Senate Judiciary Standing Committee by a vote of 3:2.

SENATOR WIELECHOWSKI stated that when he checked BASIS he found that the bill did not have a Finance Committee referral, although it has a fiscal note.

[2:48:41 PM](#)

CHAIR COGHILL announced that CSSJR 21(JUD) moved from the Senate Judiciary Standing Committee with individual recommendations and attached fiscal note.

[2:48:53 PM](#)

At ease

Confirmation Hearings
Select Committee on Legislative Ethics

[2:50:59 PM](#)

CHAIR COGHILL reconvened the meeting and announced the next order of business would be confirmations. He asked Ms. Williams to tell the committee what she hoped to accomplish while serving on the Ethics Committee.

[2:51:19 PM](#)

CHRISTENA WILLIAMS, Appointee, public member, Select Committee on Legislative Ethics, stated that she was a journalist by profession and previously served the state on the Alaska Judicial Council. She said she believes in public service and was pleased to be asked to apply to serve on the Ethics Committee.

CHAIR COGHILL asked if she had prior experience serving on an Ethics Committee.

MS. WILLIAMS answered no.

CHAIR COGHILL asked if she had listened to any meetings.

MS. WILLIAMS replied she attended the Ethics Committee meeting that was held in Juneau in January.

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CHAIR COGHILL found no objection to forwarding the name Christena Williams to the full body for consideration. He thanked MS. Williams and stated his intention to hold the paperwork until the committee heard from the second Ethics Committee appointee, Janie Leask.

[2:55:45 PM](#)

There being no further business to come before the committee, Chair Coghill adjourned the Senate Judiciary Standing Committee meeting at 2:55 p.m.