

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

February 12, 2021

1:34 p.m.

MEMBERS PRESENT

Senator Lora Reinbold, Chair
Senator Mike Shower, Vice Chair (via teleconference)
Senator Shelley Hughes
Senator Jesse Kiehl

MEMBERS ABSENT

Senator Robert Myers

COMMITTEE CALENDAR

SENATE BILL NO. 14

"An Act relating to the selection and retention of judicial officers for the court of appeals and the district court and of magistrates; relating to the duties of the judicial council; relating to the duties of the Commission on Judicial Conduct; and relating to retention or rejection of a judicial officer."

- HEARD & HELD

COVID-19 DISASTER DECLARATION, AN ALTERNATIVE APPROACH

- POSTPONED

PREVIOUS COMMITTEE ACTION

BILL: SB 14

SHORT TITLE: SELECTION AND REVIEW OF JUDGES

SPONSOR(s): SENATOR(s) SHOWER

01/22/21	(S)	PREFILE RELEASED 1/8/21
01/22/21	(S)	READ THE FIRST TIME - REFERRALS
01/22/21	(S)	JUD
02/03/21	(S)	JUD AT 1:30 PM BUTROVICH 205
02/03/21	(S)	Heard & Held
02/03/21	(S)	MINUTE(JUD)
02/05/21	(S)	JUD AT 1:30 PM BUTROVICH 205
02/05/21	(S)	Scheduled but Not Heard

02/10/21 (S) JUD AT 1:30 PM BUTROVICH 205
02/10/21 (S) Heard & Held
02/10/21 (S) MINUTE(JUD)
02/12/21 (S) JUD AT 1:30 PM BUTROVICH 205

WITNESS REGISTER

NANCY MEADE, General Counsel
Alaska Court System
Anchorage, Alaska

POSITION STATEMENT: Testified in opposition to SB 14 at the direction of the Alaska Supreme Court (ASC).

SUSANNE DIPIETRO, Executive Director
Alaska Judicial Council
Alaska Court System
Anchorage, Alaska

POSITION STATEMENT: Testified and answered questions on SB 14.

WES KELLER, representing self
Wasilla, Alaska

POSITION STATEMENT: Testified in support of SB 14.

SCOTT OGAN, Staff
Senator Mike Shower
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Provided supporting information related to SB 14.

MARLA GREENSTEIN, Executive Director
Commission on Judicial Conduct
Anchorage, Alaska

POSITION STATEMENT: Testified and answered questions on SB 14.

FRITZ PETTYJOHN, representing self
Anchorage, Alaska

POSITION STATEMENT: Testified that SB 14 was a step forward.

LINDA HOLMSPROM, representing self
Anchorage, Alaska

POSITION STATEMENT: Testified in support of SB 14.

KENNETH JACOBUS, Attorney representing self
Anchorage, Alaska

POSITION STATEMENT: Testified with recommended changes to SB 14.

ACTION NARRATIVE

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CHAIR LORA REINBOLD called the Senate Judiciary Standing Committee meeting to order at 1:34 p.m. Present at the call to order were Senators Kiehl, Hughes, and Chair Reinbold. Senator Shower joined the meeting shortly thereafter (via teleconference).

SB 14-SELECTION AND REVIEW OF JUDGES

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CHAIR REINBOLD announced consideration of SENATE BILL NO. 14, "An Act relating to the selection and retention of judicial officers for the court of appeals and the district court and of magistrates; relating to the duties of the Judicial Council; relating to the duties of the Commission on Judicial Conduct; and relating to retention or rejection of a judicial officer."

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NANCY MEADE, General Counsel, Alaska Court System, Anchorage, Alaska, spoke in opposition to SB 14 at the direction of the Alaska Supreme Court (ASC). She remarked that the ACS normally remained neutral on bills but SB 14 falls under the exception for a bill that would materially affect the administration of justice. She summarized that in a nutshell, the court viewed this bill as undermining the independence of the judiciary and the public's trust in the court system. It would hinder the ACS's ability to handle cases effectively and fairly in a few concrete ways. She reminded members that she was speaking for the Alaska Court System and not for the other two entities that reside in the judicial branch, the Alaska Judicial Council ["Judicial Council"] and the Commission on Judicial Conduct. The courts rely on those two entities and highly value their work, but they are separate.

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MS. MEADE said the Judicial Council screens applicants for judgeships to ensure that the applicants are highly qualified individuals suited to be a judge. The Judicial Council performs analyses and provides information when a judge stands for retention in an election as provided for in the Alaska Constitution and Alaska Statutes. The Commission on Judicial Conduct is solely responsible for ensuring that judges adhere to the highest judicial ethical standards reflected in the Code of Judicial Conduct that judges must and do strictly follow. This

bill would move and change many of those duties, but specific questions would be better directed at those entities.

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MS. MEADE highlighted the most severe impacts the Alaska Supreme Court views if this bill should pass. The ASC's major concerns with SB 14 appear in Sections 12 and 14. Section 12 applies to how seats on the Court of Appeals are filled when a judge leaves state service, and Section 14 applies to how District Court and magistrate positions are filled. She offered to address magistrates later since novel and overarching issues separate them from judges. Under this bill, the current merit selection process enshrined in the Alaska Constitution for the Supreme and Superior Courts would be replaced by an entirely different process of seating judges. She said that the new system would make politics and political affiliation a key factor for seating judges.

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MS. MEADE said that under SB 14, the current merit system for naming judges would be replaced with the system used in Washington, D.C. Because the court system has seen that that system puts Washington D.C. judges squarely in the middle of party politics and that its process can be slow and unfair, the ASC opposes moving Alaska's branch of government closer to that system. As long as the Alaska courts have existed, lawyers seeking to become judges apply to the Judicial Council. The council undergoes a thorough, multi-step process for gathering input from multiple sources about that person. The Judicial Council analyzes all information on the applicant that it can unearth, including the person's legal analytical skills, suitability of past experience, respect afforded by their peers and character traits such as humility, integrity, temperament, and fairness. The council conducts interviews, holds public hearings, and finally identifies who among the applicants are the highly qualified ones that could serve Alaskans as a judge. Those names are forwarded to the governor, who considers the names and conducts whatever research they wish to consider, and finally appoints the new judge.

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MS. MEADE referred to page 5, lines 13-14 of SB 14, which would allow the governor to appoint from the list of fully vetted and qualified names provided by the Judicial Council "or one person who was not nominated but is qualified under AS 22.07.040." She explained that the qualifications require that the person be a US citizen, an Alaska resident, and a bar member who has

practiced law for a certain number of years. The governor could appoint any Alaska lawyer, even if the person did not have a high level of legal ability, relevant experience, integrity, or someone who had a background that could be troubling, she said.

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MS. MEADE referred to page 5, lines 14-15, which read, "An appointment made under this section is subject to confirmation by a majority of the members of the legislature in joint session." She referred to page 6, lines 26 -27, which read, "An appointment made under this section is subject to confirmation by a majority of the members of the legislature in joint session."

MS. MEADE pointed out that unlike cabinet members, the bill says the person appointed cannot be seated until after confirmation, which establishes a statutorily built in delay in seating judges that will directly slow the progress of criminal cases. These changes are to the courts that handle criminal appeals and misdemeanors. These seats will remain vacant for up to a year, she said.

MS. MEADE stated that the confirmation process can go smoothly or it can go badly, depending on the nature of the office being filled and the political dynamics surrounding that office and the appointee. Sometimes confirmations can be acrimonious or unfair. Just look at what recently happened with the confirmation hearing in the US Senate, she said. Many of the steps required of an appointee seeking to be confirmed are incompatible with a judge's ability and duty to handle every new case with an open mind and base the decision solely on the existing law and facts that apply in the particular case. In order to make those neutral and fair decisions, a judge cannot within the bounds of their code of ethics have made commitments or made representations about what the judge would do with any forthcoming issue.

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MS. MEADE said that if the governor can appoint any attorney who has a certain number of years of practice, who is confirmed by the legislature, it means that some appointees will never have undergone a thorough vetting process like the one the Judicial Council currently performs. The factors that allow a person to become a judge will change and be replaced with factors that played no role in the Judicial Council's merit review, such as party affiliation and possibly political contributions. Those factors would become much more important in the governor's

appointment decision and during the legislature's confirmation process.

MS. MEADE said that during a previous hearing, the sponsor's staff indicated that the legislature "need to rein in the judges" somehow because the judges are, in fact, political already. And even though the courts covered in this bill don't have any jurisdiction over the social or political issues that seem to be causing concerns recently, the other two branches should have more control over the judiciary. She attested that the system has worked well. In the 60 plus years that Alaska has been a state, it has not had any judges involved in terrible public scandals or had to resign in disgrace. Some judges have been disciplined for various transgressions, but none have been criminal, and none have unsavory backgrounds that have been uncovered. That clear record is a testimonial to the thorough and careful system, she said. She said that every aspect of a judge's character and past has been examined.

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MS. MEADE said that to make these judges gubernatorial appointees with legislative confirmation has the potential that judges will be chosen like other appointees or cabinet members - with an eye for political alliances or a certain level of allegiance with the governor. She remarked that before this is taken as a slight or anything negative whatsoever, it makes sense to look realistically at how governor appointments go. If you would think a Governor Shower would appoint the same individuals as a Governor Kiehl would choose, then this makes sense, she said. Confirmation would depend on how the legislature was organized. That is exactly how politics work and it is perfectly okay. Cabinet members and advisors, and boards and commission members are intended to reflect a certain ideology and the legislature's political preferences. However, that system would be an infringement on judicial independence. Currently judges in the court system, which is a separate and equal branch of government with a mission based on neutrality and fairness is one that strives to be apart from politics. That is why the Alaska Supreme Court opposes SB 14, she said.

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MS. MEADE argued against politicizing the court. She emphasized that the goal, as explicitly discussed by the drafters of the Alaska Constitution, is to have as little political consideration as is humanly possible to determine who becomes a judge. If the complaint is that the current selection system is already political, the solution is not to replace it with a

patently and inarguably even more political system, she said. She contended that when litigants appear in a courtroom, they should not feel disadvantaged or advantaged by whose side the judge is already on based on the governor's philosophy who appointed the judge. She maintained that the solution in SB 14 would certainly politicize judges. New judges would clearly and identifiably be conservative or liberal dependent upon the governor's political affiliation and how a legislature organizes, she said.

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MS. MEADE highlighted other issues. The bill would impose a vague philosophical litmus test that would be impossible to implement, which would deter potential applicants. The selection process for the 38 magistrate positions would change to governor appointees. These magistrates have very limited jurisdiction and do not handle significant constitutional matters or ones with serious policy issues. The ACS currently struggles to fill magistrate positions. She predicted that the ACS would need to close some courts because the bill's hurdles will cause people not to apply. She cautioned that moving the retention evaluations to the Commission on Judicial Conduct (CJC) would dilute the focus of this ethics commission. The ACS has valued having the CJC focused solely on judicial ethics.

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SENATOR KIEHL asked for a follow-up on which magistrate positions would remain unfilled. He turned to the litmus test, noting that the terms seem at odds to him. Yet, the Judicial Council would be bound to only forward applicants who agree to strict constitutionalism and abide by legislative intent. He asked her to explain these philosophies from an attorney's perspective.

MS. MEADE explained that this wording was not found elsewhere in the legal realm. She maintained that it would be difficult to implement and applicants would not understand what they agreed to. She explained that strict constitutional interpretation means how a person interprets the constitution, but she did not know what was meant by "constitutional interpretation of a statute or regulation." She explained that interpreting a statute to determine what is meant and adhering to legislative intent often contradict each other. This language will raise questions about what that means, how it could be applied, if it can be implemented, and just what an applicant would agree to, she said.

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SENATOR HUGHES said she was not surprised at the ACS's position on SB 14 since maintaining the status quo is more comfortable than change. She noted that those who convened to write the Alaska Constitution purposefully did not include the Court of Appeals or magistrates in the constitution but left it to statute. She said she took issue with her statement something like "undermining the independence and the public trust of the judiciary branch. In her experience as a legislator attending public meetings and town halls, people have expressed a lot of distrust and concern that the system is lopsided. She said when she thinks of the checks and balances in the US Constitution and in the three branches of government in Alaska, she views the back and forth between the executive branch and the legislature going in both directions. However, the only way the legislature can institute checks and balances is through the budget process, she said. She asked if any other checks and balances exist for the judiciary branch.

MS. MEADE answered that the Alaska Constitution does not address the Court of Appeals and magistrates because neither existed in 1959. She pointed out checks and balances for the legislature and the judiciary currently exist. If the legislature disagrees with a decision made by an appellate court or a trial court, the legislature can overrule the court by adjusting the statutes and clarifying the language. She acknowledged that this happens at least once each legislature. She offered her belief that Legislative Legal reviews all court decisions and identifies the ones the legislature may need to address.

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SENATOR HUGHES interjected that she did not view this as overruling, but rather as submitting to the court's decision and then changing the statutes.

MS. MEADE said she has seen wording in bills that read, "in an attempt to overrule this court decision." She acknowledged that the legislature cannot change it to apply retroactively to the parties to the litigation. Still, the legislature can change the statutes to explain the statutory intent more clearly. She agreed the legislature has appropriation power. The legislature can take the first step toward constitutional changes. However, the court is limited in its ability to react. The court must resolve issues before the court, including election cases. She said she believes that people read decisions and draw conclusions about the judges who made them. If the decision ruled another way, the other side would likely draw a different conclusion, she said. She contended that judges decide cases

based on precisely what is in front of them and decide if something violates the constitution for the benefit of the people.

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MS. MEADE recalled hearing Chair Reinbold say on the floor that the state needs someone to say if a governmental action is unconstitutional. She argued that the court is charged with determining it.

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SENATOR HUGHES maintained her position that when the legislature takes further action to clarify the statutes, it is still accepting the court's ruling, which does not provide the same balance.

SENATOR HUGHES argued that when the Alaska Constitution was written, the politics of attorneys was reasonably balanced. She offered her belief that lawyers lean towards the left. She stated that some attorneys who are members of the Alaska Bar Association have made it clear to her that getting an appointment is unlikely unless the appointee is left-leaning. She asked the record to reflect this. She said, "I've had attorneys approach me and agree with bringing the people's branch into this process at least for these lower courts."

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CHAIR REINBOLD stated that Senator Shower is online.

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MS. MEADE argued that it could not be true because judges whose backgrounds were viewed as quite conservative have been recommended by the Judicial Council and were appointed as judges. She said she was unsure if something else discouraged the person from applying because the facts do not bear out the allegation.

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CHAIR REINBOLD said she also had questions about checks and balances on the judicial branch. She related that during her time in the legislature, laws have been struck down by the courts, including one on parental rights on abortion. She argued that she did not see the balance when a judge can arbitrarily make a decision. She compared it as similar to what the governor does. She maintained that the question to identify the check on the judiciary has not been answered.

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MS. MEADE remarked that she did not think that she could respond in a way that would satisfy the Chair in terms of the specific parental rights case that was mentioned. She highlighted that some entity in government has to protect the people and uphold the Alaska Constitution when the government does something unconstitutional. It is the court's role to make that decision. The court does not make the decision based on popularity or based on what the majority of the people want but based on what the Alaska Constitution provides. She explained that this is considered a built-in protection, so unconstitutional laws do not take effect.

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CHAIR REINBOLD referenced her statement that the court was to protect the people and uphold the constitution. She asked how the decision on parental rights protects people when a random person can take a girl to get an abortion without the parent's consent. She said the US Constitution provides the right to life, liberty, and the pursuit of happiness. She said she was bewildered by the answer.

MS. MEADE responded that the constitution provides numerous rights, including due process, the right to privacy, and equal protection all come into play. She said she did not come prepared to defend the Alaska Supreme Court's specific decision. She offered to discuss the case further. She maintained that the Alaska Supreme Court ensures that the constitution is followed to benefit all Alaskans. She noted that the Alaska Constitution is the supreme law of the state.

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CHAIR REINBOLD asked whether she believes that an unborn child has the right to life.

MS. MEADE responded that she was not prepared to answer that question in this forum.

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SENATOR KIEHL recalled previous testimony before the committee on Justice Douglas's majority decision in *Griswold v. Connecticut*. That decision acknowledged that citizens' rights emanate from the penumbra of the rights in the Bill of Rights, which indicates how the courts protect the people. He related that Ms. Meade had articulated the separation of powers and checks and balances that emanated from the US Supreme Court's decision in *Marbury v. Madison*. He asked whether the drafters of

the Alaska Constitution were aware of that decision and if it was altered.

MS. MEADE responded that she could not speak to the drafters' mindset, but it was an 1803 decision that provided for judicial review. Since the Alaska Constitution was drafted in 1959, the framers were undoubtedly aware of US Supreme Court decisions and US constitutional provisions.

SENATOR KIEHL asked whether the drafters altered the framework of judicial review.

MS. MEADE answered no.

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SENATOR HUGHES referred to the litmus test mentioned and judges' duties to strict adherence to the constitution. She also questioned what strict adherence to the statutes might involve. She pointed out that judges will refer to the legislature's intent with respect to specific statutes. Last March, the legislature debated on the Senate floor and decided not to remove the requirement of signatures being witnessed on absentee ballots in light of the pandemic. A judge struck that down on the constitutional basis that people have a right to vote. Yet, the [Alaska] Constitution says explicitly that the methods for absentee voting will be determined by law. The legislature debated that law and left the witness signature requirement in place. She characterized it as unilateral lawmaking.

MS. MEADE responded she was familiar with the decision, which was affirmed unanimously by the Alaska Supreme Court (ASC) shortly thereafter. She explained that this case is still pending. She characterized the decision as a 15-page decision of well-reasoned thorough analysis. The decision discussed the right to vote and weighed it against the burden that was limited to the pandemic by requiring two signatures. She was unsure if any of the attorneys argued legislative intent. She said it is difficult to research floor debate. She argued that the ruling was based on the constitution. Even if the legislature wanted something in place, the intention is not as prime in the hierarchy of law as constitutional requirements if it offends the constitution. She offered to discuss the case off the record further.

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SENATOR HUGHES commented that KTOO provides recordings of the Senate floor debates. She referred to the Alaska Supreme Court

15-page decision mentioned earlier. She asked if the decision mentioned the constitutional provision that specifically stated that the methods for absentee voting will be determined by law. She further asked if the decision mentioned the Senate's vote on that matter.

MS. MEADE offered to review the decision and report back to the committee.

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SENATOR KIEHL asked how SB 14 affects currently seated magistrates or if it only applies to vacancies. He specifically asked what happens to the court system's ability to discipline or fire magistrates. He offered his view that this bill would change those functions.

MS. MEADE offered to research it and report back to the committee in writing.

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CHAIR REINBOLD asked the record to reflect her interest in checks and balances for the judicial branch. She remarked that many people believe that political activism occurs in the court, that the court lacks diversity in its opinions since many decisions are unanimous. She referred to the ASC's decision Senator Hughes mentioned. She said the governor has proposed bills on election integrity. She asked if judges could testify before the committee to answer questions.

MS. MEADE said that was not possible. She offered to explain Judge Crosby's decision, but the decision speaks for itself and provides the legal reasoning. She added that the official court record consists of court filings and documents in writing. She said that the court will not engage in extraneous comments, explanations, or justifications on its decisions.

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CHAIR REINBOLD affirmed that someone will not come before the legislative branch shows the lack of checks and balances as a big concern. The legislative branch should be the most powerful one.

CHAIR REINBOLD indicated she would like to meet with Ms. Meade to further discuss some of her concerns.

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SENATOR SHOWER remarked that he expected opposition from the court system. He referred to the ASC's decision on absentee ballot signatures. He offered his view that the legislature's intent was clear. He recalled that the court system historically maintains it is unbiased and neutral. He questioned why this neutrality does not extend to legislators' ability to vote to confirm judges on their merits. He asked the reason why the courts can make neutral decisions but the legislature cannot make decisions on nominees without it "being a political circus."

MS. MEADE said that judges have training, experience, and adherence to the Code of Ethics. Judges are taught and trained to apply the law to the facts of a particular case without taking into consideration other matters. The Judicial Council works to ensure that the nominees will not let personal views affect their future decision-making during the appointment process. The legislature, during confirmation hearings, considers the political affiliation of nominees for boards and commissions or cabinet members. She remarked that many votes are along party or caucus lines. It is not that legislators do not care about merit, but rather what happens in the legislature is political. She said that it is allowed to be political and is more or less designed to be political. Legislators are elected to represent the politics and views of their constituents. These views are tied to partisan and political issues, not in any negative way, but one that reflects the inherent structure that necessarily involves political considerations.

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CHAIR REINBOLD remarked that legislators are thoroughly vetted and are on camera in the Capitol. She offered her view that the confirmation process in SB 14 may provide more checks and balances. In terms of Senator Hughes's concern, the committee cannot rule out the potential of political vetting in the selection process. She remarked that many lawyers have complained to her about the hostile environment for conservatives. She maintained her view that it does exist and her intention to hold a hearing on political activism in the court. She reiterated that many people believe that there is activism in the court.

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CHAIR REINBOLD turned to the next invited testimony.

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SUSANNE DIPIETRO, Executive Director, Alaska Judicial Council, Alaska Court System, Anchorage, Alaska, stated that SB 14 would make fundamental changes to the way that judges are selected and evaluated for retention. She explained that the merit selection and retention process were adopted for supreme and superior court judges in Alaska's Constitution as the best means to ensure a nonpartisan and professional judiciary. In fact, one of the drafters of the judiciary article said, "We are trying to avoid the travesties which we have witnessed in some of the states where judges are picked and plucked directly from the ward political office."

MS. DIPIETRO advised that the Judicial Council was created to play a key role in the selection of those judges by forwarding only the most qualified applicants for appointment by the governor. SB 14 would create a different selection procedure with a gubernatorial appointment with legislature confirmation for the Court of Appeals, District Court and magistrate judges, which did not exist at the time the Alaska Constitution was drafted. In deciding whether to change the judicial selection process, it may be helpful to review how the council members nominate the most qualified applicants.

MS. DIPIETRO said the Judicial Council's procedures are transparent, thorough, and focused on merit. First, to achieve transparency, the Judicial Council's procedures are posted on its website and provided to all applicants. The Judicial Council also publishes the criteria it uses for nominations. Second, in terms of thoroughness, the Judicial Council members review extensive and detailed information about each applicant's work experience, life experience, skills, ethics, and commitment to public service. The council members conduct a public hearing and interview each and every applicant. This evaluation period takes about six months. Third, the Judicial Council evaluates each applicant against merit-based criteria, including professional competence, diligence, administrative skills, integrity, fairness, temperament, common sense, legal and life experience, demonstrated commitment to public service, equal justice, and the legal needs of the diverse communities of Alaska. She said that the Judicial Council members are specifically and explicitly not allowed to consider an applicant's religious or political affiliation.

MS. DIPIETRO said another hallmark of the Judicial Council's process is collegiality. Members deliberate independently and as a group and each member is given equal time to share his/her thoughts about each applicant. Given the rigor of the Judicial

Council's process, it is not surprising that members most often agree about which applicants are most qualified, she said. She reported that 83 percent of all Judicial Council votes are unanimous or unanimous but for one. The Chief Justice historically has participated in only 5 percent of all votes and it is even rarer for a Chief Justice to break a tie between the attorney and non-attorney members. She reported that tiebreaker votes have happened in less than one percent of all votes or only nineteen times in over 35 years.

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MS. DIPIETRO reviewed the changes in SB 14 for magistrates. This bill would require the council to screen, interview and nominate additional applicants for magistrates each year. She anticipated this would likely require more targeted outreach to attract attorney and non-attorney applicants for magistrate positions since those positions can be difficult to fill.

MS. DIPIETRO turned to the changes to evaluation of judges standing for retention. The bill would transfer these duties to the Commission on Judicial Conduct (CJD). The Judicial Council has been evaluating judges since 1975. The council's approach relies in significant part on reviews from court users, including law enforcement officers, probation officers, jurors, court employees and members of the public and social services professionals. The council investigates judges' published opinions, any ethical problems, disqualifications from cases, compliance with financial and other disclosure laws, professional activities and if a judge's paycheck has been withheld for untimely decisions. This information, along with the council's recommendation on retention is provided directly to the public via the council's website. It is summarized in the lieutenant governor's official election pamphlet.

MS. DIPIETRO reported that in the past several decades court users have given increasingly positive reviews of judges' performances in surveys of attorneys, law enforcement and probation officers. She acknowledged that court users have reported significant problems with a judge or the Judicial Council's investigation has revealed negative performance or ethics issues in rare instances. In those instances, the Judicial Council publicizes the negative information and when warranted it has recommended non-retention of a judge, she said.

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MS. DIPIETRO said that the council monitors the connection MS. DIPIETRO said that the Judicial Council monitors the connection

between the nominees who are appointed and their performance while serving on the bench to ensure that its process continues to be based on merit and is nonpartisan. She related that the Judicial Council members come from all walks of life, bringing many different perspectives and experiences to the council. Despite their apparent differences, the principle that unites them is an unwavering focus on promoting a fair, impartial, and professional judiciary in Alaska.

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CHAIR REINBOLD acknowledged that she has seen diversity on the Judicial Council.

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SENATOR SHOWER asked how the court system can justify that a trade association has the ultimate ability and authority to pick judges. He related that the Alaska Bar Association is allowed to select judges. He further remarked that 19 times in 35 might not seem like much, but the public did not have any input in all those instances. He expressed concern that this does not provide any crosscheck by the public.

MS. DIPIETRO answered that the constitutional founders set up the structure. She said the drafters held discussions on who would serve on the Judicial Council. First, the drafters wanted to have three attorney members because they would know "who was good and who was not." The attorneys would need to practice under these judges, so the reasoning was that these attorneys would select good judges. She said that the Alaska Bar Association is created by law and undergoes a sunset review periodically, so the legislature is involved in that process. She clarified that the 19 times that a Chief Justice voted was 19 of over 1,400 votes over a 35-year period.

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SENATOR KIEHL referred to the 19 tiebreaking votes. He asked in how many instances that the nominee supported by the attorney members and the Chief Justice was the governor's only choice. He also asked for the number of times all of the nominees forwarded to the governor were selected by only the attorneys and the Chief Justice. In terms of the impact of SB 14, he asked for the comparative workload to screen a judge or magistrate for selection versus screening for retention and how that would affect the Commission's workload. He expressed a willingness to receive the response in writing.

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CHAIR REINBOLD said legislators are held responsible by their constituents. She maintained her position on the lack of checks and balances for the judiciary and the lack of an adequate response. She remarked that it is easy to be collegial when friends choose the judicial nominees and when the Chief Justice can provide a backup vote. She characterized it as an environment that works in many cases but it also has its challenges. She asked if deliberations for judicial selection and retention are entirely open to the public. She requested copies of surveys from the past five years or something similar.

MS. DIPIETRO deferred to Ms. Greenstein to discuss the code of ethical conduct. She related that during the selection of judges, the Judicial Council holds public meeting, and an administrative agenda, which is also open to the public. She related that any applicant could request to hold their interview in public, which routinely happens. For judicial retention, a statewide teleconferenced public hearing occurs via the legislative information system. She characterized this as a critical component of the evaluation of judges.

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CHAIR REINBOLD asked again if all proceedings are open to the public.

MS. DIPIETRO, after first clarifying the question, answered that significant portions of the processes are open to the public and are posted to the council's website. She listed the materials. In further response to Chair Reinbold, she answered that the deliberations of the council are not open to the public.

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CHAIR REINBOLD turned to invited testimony.

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WES KELLER, representing himself, Wasilla, Alaska, said the judiciary must work with the other two branches of government and reflect the value of the voters. He acknowledged that some level of politics occurs in the legislative process. He opined that the legislature has not used its authority clearly given in the Alaska Constitution to shape the judiciary. He suggested that SB 14 will move that needle a little.

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MR. KELLER expressed concern that problems exist. He read an excerpt from the fifth edition of the Guide to the Alaska Constitution on page 93, Article 4, which defines the judiciary

as follows, "The judiciary is flexible and gives the legislature wide latitude to expand and shape the system to meet the needs of the state. The delegates anticipated the future by authorizing the legislature to expand the court system by adding judges and creating new courts."

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SCOTT OGAN, Staff, Senator Mike Shower, Alaska State Legislature, Juneau, Alaska, said the court system suggested that this bill would undermine the independence of the judiciary. Still, some might argue that the judiciary is too independent with little accountability. He said the same system of evaluating judges is done by the people who nominated them. He argued that the Commission on Judicial Conduct (CJC) was a more appropriate body to review judges since it holds hearings and adjudicates complaints. The CJC can recommend the Alaska Supreme Court on the removal of judges. He related that the Commission consists of six lawyers, three appointed by the Chief Justice, and three are subject to confirmation by the legislature. The CJC also has three public members. He suggested that it is more appropriate for the people who take complaints to evaluate judges' nominees.

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MR. OGAN said that the Alaska courts would be more like the Washington, D.C. model under the bill, implying that the entire judiciary would be subject to the legislature's whim. He characterized the bill as changing a small segment related to the appellate courts, which have authority over criminal matters and for magistrates. The constitution says that all power is derived from the people. However, the Judicial Council and the Alaska Bar Association is the one "carve out." He expressed concern with the nomination process since the governor must select from the names the Judicial Council forwards. The litmus test would require nominees to follow the constitution, statutes, and regulations and strictly interpret them. He said he hoped every judge would do so. He did not understand why that would be an issue. In closing, he remarked that he talked to several conservative lawyers but they declined to testify. He surmised that these attorneys would not have declined to speak up if the judiciary were so impartial.

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SENATOR KIEHL asked to hear from the Commission on Judicial Conduct since the bill would affect the Commission.

CHAIR REINBOLD answered that Ms. Greenstein would be testifying next.

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MARLA GREENSTEIN, Executive Director, Commission on Judicial Conduct (CJC), Anchorage, Alaska, said that she has held the position since 1989. She has worked closely with the Alaska Court System and the Judicial Council. The CJC and Judicial Council have adapted and adopted procedures to complement one another and streamline their functions. She said the major changes proposed in SB 14 would change how the CJC conducts its business.

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MS. GREENSTEIN said the CJC is charged with enforcing the code of judicial conduct, which is the code of ethics for the judiciary. The CJC is composed of nine members, consisting of three judges, three attorneys and three public members. These members each bring a unique and important perspective in analyzing ethical issues that come before the CJC. The CJC meets four times a year. The office consists of a two-member administrative staff but it can hire outside counsel since it is an adjudicative body. The office investigates complaints, and the nine-member CJC sits to adjudicate the complaint. Outside counsel is hired to present the matters to the CJC.

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MS. GREENSTEIN said another function she provides is responding to judges and providing ethical advice. She explained that judges know they can call or email her with questions. Her response is timely because judges often must determine if they must recuse themselves from taking cases. Judges may be asked to speak to a group and need to know if it is appropriate to do so. She characterized this as an important function. She said she is proud that the CJC has earned the trust of the judges. Judges know they can be forthright and that the matters will be held in strict confidence. She highlighted one fear of taking on the retention function: it could jeopardize that informal trust and guidance. It may appear that the CJC already performs evaluations. The constitutional name of the CJC was the Judicial Qualifications Commission, but the name was changed because it did not accurately reflect the commission's work. Instead, the Commission on Judicial Conduct performs ethics enforcement and ethical guidance but it does not conduct job evaluations. Job evaluations consist of a very different type of process.

MS. GREENSTEIN estimated that if the Commission were to do judicial retention evaluations, it would require two additional

staff and additional office space and one additional meeting per year. In addition, the legislature obviously separated out the judicial retention and judicial ethics functions. One provision in the governing statute states that no member can simultaneously sit on the Commission on Judicial Conduct and the Judicial Council. Thus, she said there was some awareness of the need for separate functions.

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SENATOR SHOWER asked if her concern with SB 14 was with additional costs to her agency to accomplish the evaluations.

MS. GREENSTEIN answered that the resources she referred to related to the evaluation for retention. She estimated that adding the ethical responsibilities for magistrates would not require an additional fulltime position. She explained that she developed the costs based on the retention evaluation. She suggested that if the CJC only had to consider magistrates' ethical responsibilities, it would likely require one additional part-time staff since it would almost double the number of judges whose ethics the agency would oversee. She anticipated that it might result in more frequent disciplinary hearings.

SENATOR SHOWER offered to follow-up with Ms. Greenstein on this issue.

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CHAIR REINBOLD asked that the estimates be provided to the committee. She also asked her to provide the Code of Ethics for magistrates to the committee. She expressed an interest to have the committee attend a Commission on Judicial Conduct (CJC) hearing.

MS. GREENSTEIN pointed out that each of the CJC meetings has a public component. The CJC has been holding Zoom meetings. She agreed to arrange for the committee to attend the public portion of the CJC meeting.

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FRITZ PETTYJOHN, representing self, Anchorage, Alaska, stated that he is a former legislator and has been a member of the Alaska Bar Association (ABA) since 1974. He questioned why the ABA has control over the judicial system in Alaska. He offered his view that the lawyers who wrote the Alaska Constitution were "feathering their own nests" to ensure control over the judicial branch. He asserted that it has been a profitable arrangement. He disagreed that one professional association should have that

power. He stated that SB 14 is an advancement, but in order to fully address the issue it would require an amendment to the constitution, which would require a constitutional convention. He urged members to consider that option seriously.

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INDA HOLMSPROM, representing self, Anchorage, Alaska, spoke in support of SB 14. She expressed concern that currently, the governor fills positions to the Court of Appeals and District Courts by selecting from a small list of nominees submitted by the Alaska Judicial Council. This bill would allow the governor to select any attorney who meets the legal qualifications. She emphasized that this would allow elected officials representing their constituents to have a voice rather than unelected members of the Alaska Judicial Council. She expressed concern over political activism in the courts.

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KENNETH JACOBUS, Attorney, representing self, Anchorage, Alaska, said he has been an attorney in Alaska for over 50 years. He has carefully observed the process and has seen it improve over the years. He offered his view that it is the best it's ever been. He suggested several changes to the bill. First, he did not support moving the nomination process from the Judicial Council to the Commission on Judicial Conduct. The CJC deals with the judges once they are serving on the bench. He suggested that doing so would confuse the whole system. Secondly, he suggested going through the selection process but adding legislative confirmation in joint session just as the federal approval process requires. Finally, he recommended removing language in SB 14 that states that the Judicial Council can submit a candidate's name only if the Judicial Council determines that the judicial candidate understands and is committed to a strict constitutional interpretation of statutes and regulations and adhering to legislative intent. He said the legislature should not set up political standards for what the judge will decide, especially since the interpretation of statutes and regulations is not necessarily under strict scrutiny. He said, "That's bad. You can't select a person unless the person's beliefs are a certain way or he is going to construe the law in a certain way. That's not our job to tell the judge what he is supposed to do, what sort of decisions are supposed to be made when they are on the bench." He said he agreed with Mr. Pettyjohn that it is most important to have legislative oversight over the Superior Court and the Alaska Supreme Court, so a constitutional amendment is necessary.

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SENATOR SHOWER offered to speak to him about his suggestions. He expressed a willingness to hear suggestions to improve the bill. He remarked that many of the testifiers pointed out that the constitution is a well-vetted document. If so, the authority granted in the Alaska Constitution to the legislature for oversight should also be good, he said.

CHAIR REINBOLD said that public testimony will be kept open. She welcomed testimony at sjud@akleg.gov.

[SB 14 was held in committee.]

[3:05:31 PM](#)

There being no further business to come before the committee, Chair Reinbold adjourned the Senate Judiciary Standing Committee meeting at 3:05 p.m.