HJR

47

4/30/98

7-3 adopted

0-LS1091\E.1
Luckhaupt
4/24/98

AMENDMENT 1

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUSSENDORF

TO: HJR 47

Page 1, lines 1 - 5:

Delete all material.

Insert "**Proposing an amendment to the Constitution of the State of Alaska requiring legislative confirmation**"

Page 1, line 8, through page 2, line 29:

Delete all material.

Page 2, line 30:

Delete "**Sec. 3.**"

Insert "**Section 1.**"

Renumber the following bill section accordingly.

Page 3, line 12:

Delete "amendments"

Insert "amendment"

HOUSE COMMITTEE REPORT

(11)

Date Referred to Committee: March 11, 1998 **FURTHER REFERRALS:**

Date of Committee Action: 4/30/98

The FINANCE Committee considered: **HJR 47**

HOUSE JOINT RESOLUTION NO. 47 **CONST. AM: APPELLATE JUDGES**

Proposing amendments to the Constitution of the State of Alaska relating to the nomination, selection, appointment, and public approval or rejection of justices of the supreme court and of judges of courts established by the legislature that have as an exclusive purpose the exercise of appellate jurisdiction over judicial acts and proceedings, and requiring legislative confirmation of those justices and judges and of the appointed members of the judicial council.

recommends it be replaced with the following committee substitute CS HJR 47 (FIN) [ ] the same title [X] a new title

[ ] additional referral to _____ Committee
[ ] attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal note(s) _____

[ ] zero fiscal note(s) _____

APPROVES PREVIOUS: (Dept/Date)

[✓] fiscal note(s) LT of of GOV 3/11/98

[ ] zero fiscal note(s) _____

SIGNING WITH RECOMMENDATIONS		DP	DNP	NR	AM
	Therriault			X	
	Hanley			X	
	Mulder				X
	Martin	X			
	grussendorf			X	
	Davis			X	
	Kelly	✓			
	J. Davis		X		

CHAIR'S SIGNATURE Therriault Hanley

No: 1

FISCAL NOTE

Bill sion: HJR 47

(H) Publish Date: 3/11/98

STATE OF ALASKA
1998 LEGISLATIVE SESSION

Revision Date (Note if correction) _____ Dept. Affected Office of the Governor

Title Const. Amend. Appellate Judges BRU Elective Operations

Component Elections

Sponsor Representative Cowdery

Requester House Judiciary Committee Component Serial No. #21

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services						
Travel						
Contractual	3.0					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	3.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	3.0					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	3.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY98) cost: _____

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This figures includes the cost of providing information about this issue in the Official Election Pamphlet, as required by AS 15.58, and the programming costs for counting votes cast on the measure. However, only four measures can be printed on a single ballot card. If this measure requires printing an additional ballot card, the costs will increase by $56.0.

Prepared by Gail Fenumiai Gail Fenumiai Phone 465-3935

Division Division of Elections Date 2/12/98

Approved by C Lt. Governor Fran Ulmer Date 2/12/98

Agency Office of the Lieutenant Governor

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COMMITTEE COPY

(7)

Date Referred to Committee: January 16, 1998 **FURTHER REFERRALS:** **Finance**

Date of Committee Action: 3/9/98

The JUDICIARY Committee considered: **HJR 47**

HOUSE JOINT RESOLUTION NO. 47 **CONST. AM: APPELLATE JUDGES**

Proposing amendments to the Constitution of the State of Alaska relating to the nomination, selection, appointment, and public approval or rejection of justices of the supreme court and of judges of courts established by the legislature that have as an exclusive purpose the exercise of appellate jurisdiction over judicial acts and proceedings, and requiring legislative confirmation of those justices and judges and of the appointed members of the judicial council.

recommends it be replaced with the following committee substitute _____ [ ] the same title [ ] a new title

[ ] additional referral to _____ Committee
[ ] attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal note(s) _____

_____

[ ] zero fiscal note(s) _____

_____

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____

_____

[ ] zero fiscal note(s) _____

_____

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
Craig D. Porter		✓		
[illegible]	✓			
[illegible]		✓		
[illegible]			✓	
[illegible]		✓		
[illegible]		✓		
[illegible]		✓		

CHAIR'S SIGNATURE _____

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Representative
John J. Cowdery

HJR 47

WHAT'S SO BROKE THAT WE NEED HJR 47

1. What's so broke is public **EXCLUSION**.

   a> The Public has no direct access to the judicial system. Our courts are for people who have money and can afford the best attorneys. The only opportunity for a public glimpse of what a judge is like will be if they can participate in a legislative hearing during the hearing process. Once a judge is confirmed, he or she is not subject to any public inquiry.

   b> The Supreme Court is the governor of the Rules of Civil Procedure that govern all administration and conduct of legal proceedings. The court system is not user friendly to the lay person. They are exclusionary because the administrative decisions made over time by the leaders of the Court System don't consider public sensitivity a high priority.

2. What's so broke is **COMMUNICATION**.

   a> The Legislature has no opportunity to dialogue with the Court. The Chief Justice makes an annual speech to the legislature but does not make himself available to questions. He has a Chief Administrator and lobbyist whose chief functions are to procure what the Courts want from the Legislature. I believe the opportunity to dialog with the court will mutually benefit both of us. Confirmation hearings represent a new channel of communication. Communication never hurts.

3. What's so broke is **JUDICAL RESTRAINT**

a> The courts overstep their bounds when they use legal conclusions to invoke sweeping changes in public mores. The infamous decisions to protect partial birth abortions, to promote same sex marriages, to require private hospitals and their employees to perform abortions, to disallow parental consent requirements for abortion for minor children, to allow four ounces of marijuana for personal consumption, etc., etc., should not be the result of court invoked public policy. These issues are just as alive in other states. But, their courts haven't been as aggressive in re-writing the gospel of public morals. Alaskan courts have not learned to write narrow opinions. They use legal issues to wedge their own mandates into Alaska's laws.

Most of these decisions have come from lower court judges who would not be confirmed under HJR 47. However, by requiring public preview of the top-most judges, who are the leaders of the court system, a tenor will be set that should pervade throughout the court system. If not, then incremental expansion of legislative confirmation to lower courts may be considered.

Ninth Circuit Court of Appeals Judge, Andrew Klienfeld, an Alaskan, is quoted in his successful minority opinion, which was subsequently upheld by the U.S. Supreme Court, as saying:

"The founding fathers did not establish the United States as a Democratic Republic so that elected offices would decide trivia, while all great questions would be decided by the judiciary."
(Compassion in Dying v. State of Washington)

4. What's so broke is **CHECKS AND BALANCES**

a> There aren't any. Alaska's constitution is great but it's not perfect. Our experience has shown that the imbalance of checks on the judiciary branch leads to the problems we have. Currently, the lawyers who practice before judges have the primary input into their selection. The governor has little more than a rubber stamp role in the selection process. The legislature and the public have none. The current checks are out of balance.

HJR 47

Relating to Legislative Confirmation of Appointees to the Supreme Court, Court of Appeals and the Judicial Council

SPONSOR STATEMENT

HJR 47 provides for the legislative confirmation of judges appointed to Alaska's Supreme Court and the Court of Appeals. It also provides for legislative confirmation of all members of the Judicial Council.

The Supreme Court was created in Alaska's constitution and therefore a constitutional amendment is necessary to change the process for selection of Supreme Court Justices.

Presently, the constitution says, at Article 4, Section 5:

> "The governor shall fill any vacancy in an office of Supreme Court justice or superior court judge by appointing one of two or more persons nominated by the judicial council."

The Court of Appeals was established by statute, A.S. 22.07. It is a court of record with appellate jurisdiction in actions commenced in the superior court.

A.S. 22.07.70 says,

> "The governor shall fill a vacancy or appoint a successor to fill an impending vacancy in the office of judge of the court of appeals within 45 days after receiving nomination from the judicial council, by appointing one of two or more persons nominated by the council for each actual or impending vacancy."

HJR is crafted to apply to appointments to both the Supreme Court and the Court of Appeals. It does so by adding constitutional language referencing courts of record with appellate jurisdiction that are established by the legislature, and, requiring all such appointments to be presented for legislative confirmation.

An additional feature of the HJR 47 is that also requires confirmation of all members of the Judicial Council. This council is also created in the constitution at Article 4, Section 8. It provides that three public members appointed by the governor shall be confirmed by the legislature. However, it also provides that three attorney members appointed by the Alaska Bar Association do not have to be confirmed. HJR 47 requires all members of the Council to be confirmed by the legislature.

The motivation for the constitutional amendment is to include the public in the process of appointing judges. The public has less input into the judicial branch of government than in either the executive or legislative branches. These other branches have elections and compulsory public input in their decision-making processes. Even the governor's cabinet appointees are subject to legislative confirmation. By providing for legislative confirmation of judges, the public will be able to participate in confirmation hearings. Judicial candidates will be able to present their philosophical approach to jurisprudence. The public will have a voice in their selection.

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Representative
John J. Cowdery

March 3, 1998

Honorable Joe Green, Chairman
House Judiciary Committee
118 State Capitol Building
Juneau, Alaska 99801

Dear Mr. Chairman and Members of the House Judiciary Committee:

I would appreciate your vote to move and pass HJR 47 from committee. The issues involved in this Resolution are apparent to all. In fact, if you will review my testimony, attached, you will see that I anticipated the primary arguments against the bill and effectively answered them.

All testimony from the public was in favor of HJR 47, except for two organized lawyer/judge groups and former Senator Vic Fischer who was voted out of office in favor of a more conservative senator. Those who spoke or left written statements supporting HJR 47 include former Lieutenant Governor and Constitutional Convention Delegate, Jack Coghill, former Anchorage Mayor Tom Fink, Attorneys Ken Jacobus, Rob Reiman and Wayne Anthony Ross, Mr. Jerald Des Jarlais, Ms. Sue Fischetti, Mr. Ross Dunfee and many others who came to the LIO's but departed before we could get to them.

HJR 47 is so popular with the public that I can fill many hours of hearings with favorable testimony. But it would be redundant because the issues are few and fundamental. I would like to recap them for your consideration.

First, I need to address the extraordinary testimony of Chief Justice Warren Matthews. Chief Justice Matthews' personal participation was intended to

convey the considerable influence of his high office against HJR 47. He wanted to make a statement and he did it twice. He made his statement at the committee hearing and again in the Joint Session on the State of the Judiciary. His testimony lacked in both form and substance. I will elaborate.

As to form, Chief Justice Matthews had the opportunity to apprise himself in advance of the contents of the legislation, the sponsor statement and the supporting testimony which preceded his. Yet, he chose to not engage the arguments presented. Instead he offered parallel arguments that did not intersect with information already on the record.

As legislators, we publish our sponsor statements. We lay bare our reasoning and motivation in public testimony. We endure the slings and arrows of debate, sometimes contentious debate, to arrive at the truth and value of the premises contained in our legislation. We do this as a necessary part of the democratic process. We are not especially trained in the fine points of rhetoric and debate. But we are driven by our public responsibility to test ourselves, our thoughts and our principles in a crucible of diverse and public argument.

The judiciary, unlike the legislature, is especially trained in the art of rhetoric, argumentation and debate. There are few who can hold their own against the Judiciary's superior education, training and acumen. And, one must suppose, too, that members of the Supreme Court are the supreme representatives of their craft. Having regard for the safety of my own ego, I do not relish being pitted against someone who is so much better trained than I. Yet, legislative accountability demands that I answer all arguments on the issues that I adopt. The Chief Justice is not so obligated. He is free to pick and choose which issues to engage, which to ignore, which venues to participate in and which ones to ignore; all in all a royalist approach to public responsibility.

Chief Justice Matthews advanced no argument that was not, or could not be, advanced by other officials of the Bar Association, Judicial Council, his lobbyist or administrative staff. Why, then, was it necessary for him to take the extraordinary step to personally testify against HJR 47? If he brought no unique information to the debate, then his only purpose could have been to see what legislative mettle might wither under the influence of his high

office. It was a political stroke through and through! For all his argument against politicizing the process, it seems he is quite willing to be political on his own terms.

Further, as to error of form, whenever a member of the Judiciary pre-judges a legislative issue, the integrity of the judicial forum is compromised if the issue is thereafter litigated. It is simply bad judgement for the judiciary to directly advocate in the legislative process. The Judicial Council's Executive Director testified. The Chief Justice is Chairman of the Judicial Council. There is a variety of ways for the Judiciary to get their arguments on record without compromising the public process they administer.

As to substance, Chief Justice Matthews presented three lines of argument against HJR 47. First, he contends that legislative confirmation of judges will politicize the selection process. As evidence, he offered the parallel of the federal system's judicial appointments. He says whenever the President and the U.S. Senate are controlled by different political parties there is always a controversial vote that goes down party lines. He pointed to the Clement Haynesworth, Robert Bork and Clarence Thomas nominations as examples. He says a judge who is championed by one political party and opposed by the other could be suspected of being partisan in cases with political issues at stake.

Two key flaws exist in his "politicization" argument. First, he assumes politics is necessarily bad. Second, he totally mischaracterizes the federal judicial confirmation system.

This argument, that legislative confirmation equates to politicization of the judicial selection process, is true. Black's Law Dictionary helps us define our terms:

> "**Political**. Pertaining or relating to the policy or the administration of government, state or national. Pertaining to, or incidental to, the exercise of the functions vested in those charged with the conduct of government; relating to the management of affairs of state, as political theories; of or pertaining to exercise of rights and privileges or the influence by which individuals of a state seek to determine or control its

public policy; having to do with organization or action of individuals, parties, or interests that seek to control appointment or action of those who manage affairs of a state."

"**Politics:** The science of government; the art or practice of administering public affairs."

If "politicization" means exposing judicial candidates to the rough and tumble that sometimes results from a public process, then it is of course true. It is true and it is GOOD!

There is nothing inherently evil or untoward in politics. Politics, like justice, is as good as the people who administer it. Politics is simply a shorthand word for going about the public business. Surely, it is easier to be aloof from the public, as is the judiciary. They are the closest thing to royalty we have in our society.

However, the Chief Justice must have a different meaning in mind for the word 'politics'. His meaning has a degrading meaning, suggesting something sinister about the political process. Any suggestion that public involvement inherent in the legislative process is somehow debasing, is too royalist a view for our democratic society. It is further testimony that the Judiciary is out of touch with the people of Alaska. Public confirmation hearings would be an in-touch experience for judicial nominees.

Apparently, CJM only recognizes 'politics' as occurring in the legislative branch. He admits to no political considerations being played out in the executive branch during the appointment process. Does not the White House look for judicial candidates who are philosophically compatible and supportive of its major precepts? Aren't there special interest groups, politicians and people of influence who advocate to the White House for or against certain candidates? The point here is that politics does indeed play a prominent role in the executive branch's appointment process, and it largely excludes the public. Public involvement doesn't occur until an appointment becomes a nomination and is sent to the legislative branch, i.e., the U.S. Senate. Public involvement is the key difference between the executive and legislative branch's appointment processes. This is the step missing in Alaska's current system that HJR 47 will remedy.

The Judiciary and the Alaska Bar Association have their own, rich history in judiciary politics. A former Chief Justice tied up Bar Association funds. In retribution, the Bar Association actively worked to defeat the 1964 Supreme Court Justice Arend, who was up for retention election. (See Bar Rag..date)

Chief Justice Matthews advanced the Haynesworth, Bork and Thomas appointments as examples of politicization of the federal process that we should avoid at the state level. He selected these three appointments from a span of about 25 years. In fact, they are not representative of the federal appointment process. During the past 25 years, they are the nominations which commanded the most news coverage. After Clarence Thomas's appointment, another Justice was appointed to the U.S. Supreme Court. Most people can't remember his name because no controversy attended his confirmation. Haynesworth, Bork and Thomas are not typical of the federal process. There are about 800 federal judgeships. About 68, on average, are politically confirmed each year, routinely and without fanfare

Contrary to Chief Justice Matthews' argument about 'politicization,' politics smooths out the confirmation process. By no written rule, but only as a matter of political expediency, the Senate and the White House have an informal arrangement whereby the senior U.S. Senator from each state concurs in the federal judicial nominees from their respective states. This process is a political compromise that results in the overwhelming preponderance of federal nominees to be confirmed without controversy. Politics, it is shown, facilitates the appointment process.

Further analogizing the federal system with HJR 47, CJM said that when the executive and legislative branches are controlled by different parties, the vote always tends to go down party lines. Again, the votes on Haynesworth, Bork and Thomas are simply not indicative of the pattern of congressional approval. In fact, party line votes are rare in the appointment process, both at the federal and state level. One need only review the President's and the Governor's cabinet and other political appointments submitted for legislative confirmation. The overwhelming preponderance of the their appointees are confirmed without regard to party considerations. Legislative confirmation is not the bugaboo that CJM claims it is.

In answer to a query from a member of the committee, CJM said,

"I don't accept the premise that there is partisanship inherent in the appointment of Alaskan judges."

He offered that his own appointment by Governor Hammond was an example of a cross-party, therefore non-partisan, appointment. The Chief Justice presumes that party affiliation is the only basis for partisanship. In fact, we know a variety of bases for partisanship including conservative vs. liberal, urban vs. rural, development vs. no-growth, pro-governor vs. anti-governor, etc. CJM's appointment by Governor Hammond would have been much less likely if his client list included aggressive development interests in lieu of the Sierra Club. His main benefactor for the appointment was the Governor's Administrative Assistant who also was his former law partner. Some would say he had 'political' connections. CJM would have us believe that politics is something that happens in the legislature's back yard, never in the governor's or the judiciary's.

If appearance of partisanship is an issue that truly concerns CJM then perhaps he should resign and revisit the appointment process without political support. As one member of the Judiciary Committee said, "politics is inherent in the process." To deny this fact is extremely naive. To contend that it is base, is an insult to the body-politic in general and to the legislature in particular.

As for his concern that a judge could appear to be obligated to the legislative party that champions his confirmation, why is it not a concern to him that a judge could appear to be obligated to a governor who appoints him. Uncontested partisanship should not be confused with non-politicization.

The second line of argument employed by CJM against HJR 47, was that it could result in confirmation delays and bottleneck the courts' work flow. He noted that he was appointed in the month of May. If he could not take office until after legislative confirmation seven months later, it would prolong the vacancy and impede the court's productivity.

This argument is somewhat disingenuous because it ignores the adaptability of people and organizations. With legislative confirmation in place, most

resignations and retirements will simply schedule themselves around the legislative calendar. As a matter of administrative efficiency the Court System could require a one-year notice for judgeships that require confirmation. It can be argued that unforeseen vacancies due to accidents or death could still present a problem. The record shows that these occurrences are rare. And, inasmuch as the Judicial Council's process takes from three to six months, the risk of being out of sync with the legislature is statistically insignificant.

Also, although CJM expressed reluctance to use temporary fill-in appointments for the high court, the Constitution gives him the authority to do so. Alaska has a repository of retired judges who can perform this temporary function. The Chief Justice need only exercise the power given to him in the law.

Finally, Chief Justice Matthews third argument against HJR 47 was that it would "degrade" the "merit system" now in place. Nothing could be further from the truth. HJR 47 maintains the current system in total. The Judicial Council and the Bar Association will still go through the same polling and grading processes. They will still interact with the governor in the same way they do now. When all their work is done, and after the governor makes his decision. HJR 47 simply gives the legislature and public a role to play in the appointment process.

However, CJM warned that if the legislature rejected the top two nominees, working down the list to other candidates would result in inferior quality of judges. One can only note that this argument is built on an inflated opinion of the precision and objectivity of the selection process. In all probability, a different set of raters would yield a different set of results. Many attorneys refrain from submitting their applications for judgeships because they believe the selection panel as biased against them.

In summary, HJR 47 retains the existing merit selection system. It adds public participation via the legislative forum. It requires legislative approval of attorney members of the Judicial Council and judges for the Court of Appeals and the Supreme Court. Confirmation will result in appointees who are acceptable to a broader segment of the public than only the narrow constituency of the appointing authority. In effect, legislative confirmation

adds a "whole man" review of the nominee's suitability for appointment. This is a proposition that we can recommend to the General Election ballot for final determination by the voters of Alaska.

Yours truly,

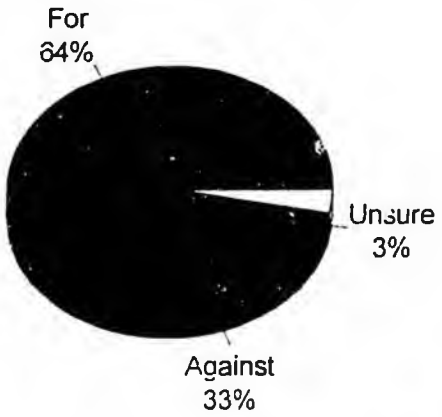
John J. Cowdery
Representative

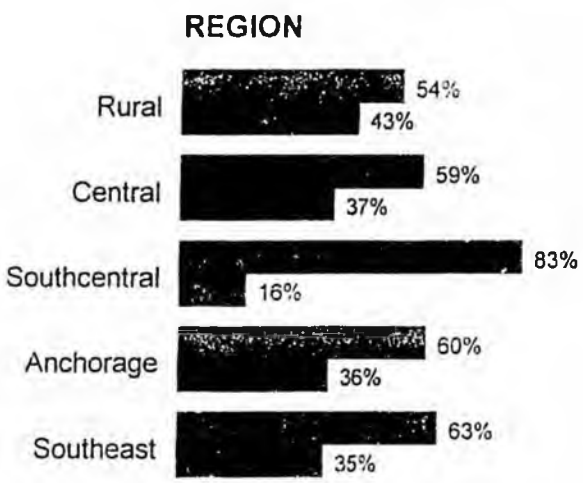
HJR 47

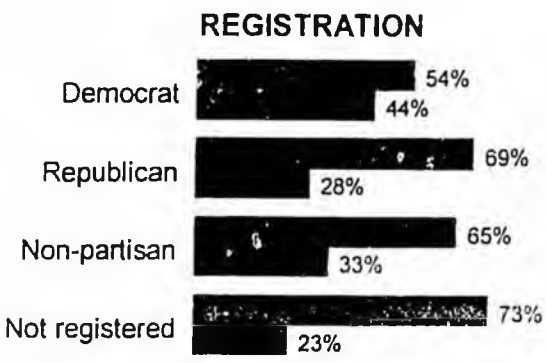
Legislative Confirmation of Judicial Appointments

Similarly, approximately two out of three Alaskans (64%) report they support legislative confirmation of judicial appointments...

"At the present time in Alaska, judges on the Supreme Court and Courts of Appeal are nominated by a judicial council and appointed by the Governor. If there were a constitutional amendment on the ballot that would require a majority vote of the Legislature to confirm judicial appointments, do you think you would vote for or against that constitutional amendment?"







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MEMORANDUM March 31, 1998

SUBJECT: Testimony regarding the drafting of constitutional amendments (HJR 47)

TO: Representative John Cowdery

FROM: Tamara Brandt Cook
Director TBC

You have sent me an excerpt from testimony from Vic Fischer, former Senator and member of the constitutional convention, in which he objects to the drafting of recently proposed constitutional amendments in general and of HJR 47 in particular. He recommends that the legislature establish a style in drafting process to ensure that proposed constitutional amendments are in "proper shape." You have asked for my reaction to that testimony.

I believe that I understand Vic Fischer's concern, but, on reflection, I fear that the difficulty with the constitutional language that Mr. Fischer has identified has to do with the complexity of the purposes that are sought to be achieved and the reluctance of legislators to leave the details of proposed constitutional amendments to the courts to sort out. Obviously, to the extent that the constitution is used to address specific rather than general situations in precise ways the language needed to achieve the desired result becomes less simple.

For example, the reason that section 1 of HJR 47 is so complicated is that several things are added to what is now a very simple provision:

(1) the appointment and confirmation of judges with appellate jurisdiction is addressed;

(2) not only is legislative confirmation required of supreme court justices and appellate judges, but the question of presentment is addressed along with the question of when a nominee may assume office to fill a vacancy;

(3) what happens when a nominee fails to be confirmed is addressed in a very specific way--the same person may not again be appointed until a new legislature is elected at a general election and convened;

(4) the requirement is added that appointees for other judicial offices that may be established by law be selected from nominees of the judicial council.

If, as a substantive matter, all of these items are to be addressed, I do not think that it is possible to also keep that constitutional section simple. Perhaps I am wrong and I would certainly welcome suggestions for better language that achieves the same results.

I wonder, however, if the style in drafting process envisioned by Mr. Fischer would be limited to suggesting drafting changes that do not change the substance of a constitutional amendment proposal or whether Mr. Fischer suggests that the style in drafting process include the substantive simplification or alteration of proposals: I also wonder how the style in drafting process would be accomplished. Should a new style in drafting standing committee be created? It might be well worth while to get Mr. Fischer's thoughts on these points.

TBC:jdr:pl
98-218.jdr

From the office of . . . **Representative John J. Cowdery**
State Capitol Bldg., Room 416
Juneau, AK 99801
907-465-3879 phone
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MEMORANDUM

TO: Tam Cook, Legislative Legal Services 465-2029

FROM: Representative Cowdery J.C.

DATE: March 20, 1998

RE: testimony on bill drafting

Notes: House Judiciary 2/20/98 HJR 47 Vic Fisher:

The following is an excerpt from testimony on HJR 47, from Vic Fisher, former Senator and member of the constitutional convention. I would like to offer some defense for the drafters in this case. Please advise on what course of action you recommend.

Technically and in terms of style, with all due respect to my ol' friend John Cowdery, the drafting of the proposed amendment is an inexcusable abomination. I have hardly ever seen anything this poorly drafted. This is not constitutional language that it has proposed. It is the worst of legislative drafting. Compare the drafts of the amendments with the judicial article on the judiciary. Look at section 1, section 2, section 3, section 4, section 5, it is clear and claritable, positive, simple straightforward understandable sentences. You do not have conductive language that just doesn't fit into a constitution. The only part of HJR 47 that is properly drafted is section 3. It is clean, its understandable, it do does not make a mess. I would say almost the same thing about HJR 4. I signed up to testify on both. I think HJR 4 is not significant. I don't think it is an important proposed amendment. I think it would tilt the balance of the powers at the constitutional level somewhat from the legislature to the executive, but not significant. Again you do not have quite an abomination, but again it is an example of lousy drafting. I will not go into detail, but I would be glad to work with anyone who wants to. Or right now I would be glad to give examples. I think that the legislature should establish a style in drafting process. Like what came to be in existence in the Constitutional convention to get proposed amendments into proper shape. So that # 1) it fits into the constitution in constitutional language and they don't end up with a hodge podge that you have in HJR 47. Or like in legislature drafted amendments that became section 16 and 17, of the finance articles that have to do with expenditure limit and budget reserve account.

STEPHANIE J. COLE
Administrative Director

Alaska Court System

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THE ALASKA COURT SYSTEM OPPOSES HJR 47

The Alaska Legislature is currently considering HJR 47, which would require legislative confirmation of appellate court judges. The changes proposed in HJR 47 would erode the balance of power among the three branches of government and weaken Alaska's nationally-recognized system of merit-based selection of judges. The proposed system could add months to the selection process, creating a real danger that extended judicial vacancies will result in delays in the resolution of court cases. The changes would also pull judicial candidates into the realm of partisan politics and threaten judicial independence.

Alaska's Merit-based Selection Process is Rigorous and Nonpolitical

Unlike the federal court system, Alaska's current structure for selection of judges is a rigorous, merit-based process. The drafters of the Alaska Constitution resoundingly rejected the idea of electing judges by a vote of 51-2, in favor of a method with a minimum of political consideration or partisanship. Alaska was only the third state to use merit selection, but today 35 states have some method of merit selection. The national movement is toward judicial selection processes that are less political, not more.

Under our current selection system, the Alaska Judicial Council recruits applicants for judicial vacancies, investigates and screens those applicants on the basis of their demonstrated abilities to perform judicial duties, and forwards names of qualified applicants to the Governor, who must make a final selection from only

those names sent by the Council. The Judicial Council is a nonpartisan commission of lawyers and non-lawyers, who examine each applicant's education, employment history, activities, credit and criminal history, bar discipline history, client grievances and conflicts of interest. Only those candidates who are deemed most qualified after this extensive investigation are forwarded to the Governor. This process does not involve any consideration, or even identification, of the partisan political affiliations of the judicial candidates.

In the final step of the process, the Governor may only choose from the applicants found most qualified by the Council. Prior governors who have been unhappy with choosing only from among the applicants sent forward by the Judicial Council have requested additional names, but the Council has consistently declined to add applicants at a Governor's request. In the past, there has been no consistent tradition of the Governor appointing on a partisan basis; judges have been appointed who have had different political affiliations than the Governor.

Retention Elections Allow the Voters to Retain or Remove Judges

The people of Alaska have the opportunity to approve or reject judges at periodic retention elections. Alaska has the nation's most extensive system for seeking public input on retention. The Judicial Council surveys lawyers, law enforcement officers, jurors, court employees and children's caseworkers. It looks at a judge's disciplinary record, disqualifications from assigned cases, appellate record, and the evaluation by the CourtWatch program. The Judicial Council holds public hearings to allow people to testify about their experiences with judges who are standing for retention. Most of this information is made available to the voters. A judge will be voted out of office if enough voters are unhappy with the judge's performance.

HJR Would Increase Judicial Vacancy Periods and Aggravate Court Delay

The provisions of HJR 47 undermine the current process, and would have a negative impact on both court operations and service to the public. Currently,

approximately six months pass between the time applications for the judgeship are solicited and the Governor's selection of the successful candidate. Under the changes set forth in HJR 47, the Governor's appointee will not be able to take office until after legislative confirmation. Depending upon the time of year of appointment (which might be when the legislature is not in session) and upon the willingness of the legislature to act swiftly in holding confirmation hearings, many months could be added to the period of judicial vacancy.

An extended judicial vacancy has a high impact on any court's ability to do its work. In the federal system, legislative reluctance to hold hearings and to confirm judicial appointments has created a crisis for the federal judiciary, as cases are backlogged because of the lack of judicial resources to decide them. In the Ninth Circuit, approximately one-third of the positions are vacant, and two have been empty for more than two years. Historically, appointment delays have been aggravated in the fourth year of a presidential term, when confirmation is often withheld by a Senate controlled by an opposition party. At the state level, should the legislature decide to disapprove an appointment, a lengthy period of delay would result, as an entirely new selection process might be required.

HJR 47 May Affect the Pool of Judicial Applicants

Lengthening the time between application and assumption of judicial office will also have a disproportionate impact on attorneys in the private sector. Applying for a judgeship is already a disruptive process for private sector attorneys, who must make hard decisions about pursuing cases and accepting new clients during such an extended period of uncertainty. Public sector attorneys, who do not have to worry about maintaining a client base, and sitting judges who are seeking appointment to a higher judicial seat, will have a great advantage. An often-expressed goal is that our judges should have histories which reflect both private and public sector experience, and this goal would not be promoted by the changes proposed in this legislation.

HJR 47 Erodes Judicial Independence

But by far the greatest danger in this proposed legislation is its erosion of judicial independence. As has been seen in much-publicized federal confirmation hearings in recent years, judicial candidates who enter the legislative realm are often subject to the currents of partisan politics. The Canons of Judicial Ethics do not allow judicial candidates to "...make pledges or promises of conduct in judicial office other than to faithfully and impartially perform the duties of the office," nor may a judicial candidate, "make statements that commit or appear to commit the candidate to a particular view or decision with respect to cases, controversies or issues that are likely to come before the court." It is a fundamental principle of the law that a judge has the responsibility to weigh the facts of each case impartially, and to apply the law to those facts, to reach a decision. To the extent that demands are made in a confirmation process, as they often are, that a judicial candidate commit to a particular view of controversial issues, a judge who emerges from the process can easily be perceived as biased towards a particular point of view. If a judicial candidate is championed by one political faction, and opposed by another, the judicial candidate's ability to handle controversies involving those parties later in the courtroom is severely compromised.

Edward W. Madiera, Jr., the chair of the ABA's Commission on Separation of Powers and Judicial Independence, has noted that "Judicial independence is not for the protection of judges, but for the protection of the public." Each person who brings a case in Alaska's courts should feel that his or her case will be measured on its individual merits, by a judge who is free from bias and political obligation. Our current merit-based system, which keeps judicial candidates out of partisan politics and yet empowers the voters to remove judges in retention elections, is one of the best in our country. It encourages the appointment of well-qualified, independent, and courageous judges. The changes proposed in HJR 47 would be a step backward for justice in Alaska.

Alaska Constitutional Convention Minutes

Selection of Judges

concerning Legislative Confirmation

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....[Coghill has moved that attorney Judicial Council members be confirmed by the legislature]

MCLAUGHLIN: I presume Mr. Coghill submitted this motion merely for the purpose of getting this on the floor coldly and calculatingly. If this motion is passed, you might as well tear up the whole proposal and provide for the election of juries because then it would be more efficacious and more democratic. The whole theory of the Missouri Plan is that in substance, a select and professional group, licensed by the state, can best determine the qualifications of their brothers. The intent of the Missouri Plan was in substance to give a predominance of the vote to professional men who knew the foibles, the defects and the qualifications of their brothers. It is unquestionably true that in every trade and every profession the men who know their brother careerists the best are the men engaged in the same type of occupation. That was the theory of the Missouri Plan. The theory was that the bar association would attempt to select the best men possible for the bench because they had to work under them. If you require a confirmation of your attorney members you can promptly see what will happen. The selection is not then made by the organized bar on the basis of a man's professional qualifications alone. The determination of the selection of those people who are on the judicial council will be qualified by the condition, are they acceptable to a house and a senate or a senate alone, which is essentially Democratic or essentially Republican. No longer is the question based solely on the qualification

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of the candidate for the bench. The question is, will those people whom we set up here on the judicial council, that we send from the bar, will they be acceptable in terms of political correctness? If political correctness enters into the determination of the selection of those professional members who are to be placed upon the judicial council, the whole system goes out the window. All you have is one other political method of selection of your judges. The theory, and it is the only way it can possibly work, is that the lawyers are put on there to get the best man and not to take a man on the basis of his politics. But if we require confirmation, then the material consideration to be made by the Alaska Bar Association is, are we sending our best representative--no. But are we sending a good Democrat acceptable to both members to both houses or are we sending a good Republican acceptable to both houses. If we permit that determination to enter into our consideration, then in substance we should provide for an initial election or initial appointment by the governor or some other body. Qualifications go out the window as soon as you have confirmation. The theory on the lay members on the confirmation, they represent the public and they represent the predominant political thought. The theory on the lawyer members of the council, they represent the profession, they represent the best interests of the profession. They represent a desire to have the best judges on the benches. I beg of you, please don't vote for the amendment.

LEGISLATIVE CONFIRMATION OF JUDGES AND ATTORNEY MEMBERS OF THE JUDICIAL COUNCIL

Position paper of the Alaska Judicial Council, February 1998

HJR [illegible] and SJR 34 propose a constitutional amendment to require legislative confirmation of appellate judges and attorney members of the Judicial Council. The Alaska Judicial Council strongly opposes this amendment.

Alaska's System of Merit Selection and Retention Elections Is Fair and Thorough

Alaska uses the merit selection system for choosing judges, asking a nonpartisan commission of lawyers and non-lawyers to recruit, investigate, and evaluate applicants for judgeships. The Alaska Judicial Council has seven members: three non-lawyer members nominated by the Governor and confirmed by the Legislature, three lawyer members elected on a regional basis by members of the Alaska Bar Association, and the Chief Justice of the Alaska Supreme Court.

SELECTION: The Judicial Council conducts an extensive evaluation of all judicial applicants, investigating their education, employment, activities, credit and criminal history, bar discipline, client grievances, and conflicts of interest. It surveys bar members about the applicant's suitability to be a judge, conducts public hearings, and interviews each applicant. The Judicial Council carefully reviews all of this information and passes the names of only the most qualified applicants to the Governor for appointment.

RETENTION: Unlike federal judges, who are appointed for life, Alaska judges must come before the voters periodically to determine if they should continue in office. Alaska has the nation's most extensive system for seeking public input on retention. The Judicial Council surveys lawyers, law enforcement officers, jurors, court employees, and children's caseworkers. It looks at the judge's disciplinary record, disqualification from assigned cases, appellate record, and evaluation by the CourtWatch program. It holds public hearings to allow people to testify about their experiences and concerns. The Council makes the great majority of this information available to the voters. If enough voters are unhappy with the judge's overall performance, the judge is voted out of office.

The Amendment Is at Odds With the Goals of the Alaska Constitutional Convention

WHY MERIT SELECTION WAS ADOPTED: The drafters of the Alaska Constitution wanted to avoid the politics that plague elective judiciaries in other states. They resoundingly rejected the idea of electing judges by a vote of 51-2, in order "to select the method with the minimum of political consideration or partisanship." Alaska was the third state to use merit selection; today 35 states have some form of merit selection of judges. As other states become disenchanted with the caliber of their elected judges, they have made the selection process less political, not more.

WHY LAWYER MEMBERS ARE SELECTED ONLY BY THE BAR ASSOCIATION: The drafters felt strongly that attorneys should be allowed to select their own representatives to the Judicial Council, on the theory that they were the best judges of the professional competence and integrity of their peers. The delegates were emphatic that lawyer members should not be selected for their partisan affiliation, their political correctness, or their acceptability to the Legislature. They rejected legislative confirmation of lawyer members by a vote of 49-2. The drafters required legislative confirmation of non-lawyer members of the Judicial Council to ensure that lay members could operate independently of the Governor.

Response to the assertion that the **Judicial Conduct Commission** and the **Judicial Council** are adequate public representation:

Ombudsman Investigation Summary, May 23, 1997
Concerning allegations filed against Judge Carlson; after the conclusion of the Frank Feichtinger case:

*". . .the [Judicial Conduct] commission waited another **16 months** to **begin** investigation." (page 2)*

*". . .the ombudsman's investigation determined that the [Judicial Conduct] commission **failed to pursue** two relatively specific and readily verifiable allegations of misconduct."*
(page 3)

"However, the ombudsman is concerned that public confidence in the [Judicial Conduct] commission process is not enhanced when attorney members hear complaints about judges who preside over a high percentage of cases handled by the attorney."
"Commission members do not currently view these professional interactions as automatic *grounds for recusal." (page 3)*

*". . .the [Judicial Conduct] commission takes the position that a **constitutional amendment** would be required to either change membership or provide alternatives" (to the current system.) – (page 3)*

Support for the assertion that the Judicial Commission investigates ineffectually and minimizes misconduct when discovered.

When the then Chief Justice Compton was stricken with the George Jacko syndrome, merely stepped down as Chief but continues to serve. I have serious concerns about someone essentially convicted of sexual harassment sitting in judgement over similar offenders.

Isabel Traugott, the sexually harrassed employee, said,

"It's both a judicial ethical violation and a violation of the law. . ."

"I don't feel it's appropriate for him to remain as a judge, given those factors. . ."

"I feel that there's a big concern about somebody presiding over sex harassment cases that commit sexual harassment toward his employees."

Compton Steps Down – July 3, 1997 Juneau Empire

And this is all the public was told:

Alaska Commission on Judicial Conduct
Public Notice of Private Admonishment

After an extensive investigation and consideration of the nature of the conduct involved, the Alaska Commission on Judicial Conduct has issued a private admonishment to Chief Justice Allen T. Compton. The admonishment addresses two incidents of conduct by the justice in 1995 and 1996 concerning two court system employees. The Commission concluded that this conduct constituted sexual harassment in violation of the Alaska Code of Judicial Conduct.

Sealed Records

The Commission is authorized by statute and its own rules of procedure to issue a private admonishment. Chief Justice Compton has agreed to this public notification of the private admonishment.

Alaska Commission on Judicial Conduct, 310 "K" Street, #301, Anchorage, AK 99501
272-1033 or In Alaska 1-800-478-1033

"This is the only information that the Commission may publicly release concerning the matter." – Marla N. Greenstein

TABLE 8

ACTIONS TAKEN

1993 - 1997

Actions Taken	1993	1994	1995	1996	1997
Complaints investigated	27	33	20	15	15
Judges asked to respond in writing to alleged misconduct	1	1	0	0	2
Judges summoned before Commission to explain alleged misconduct	0	0	0	0	2
Cases dismissed before formal hearing	0	0	0	0	1
Cases dismissed as unsubstantiated (complainant unavailable)	0	0	0	0	0
Cases dismissed for lack of jurisdiction	28	18	28	16	26
Cases dismissed for insufficient evidence after investigation	23	30	20	14	13
Private censures, admonishments, reprimands and cautionary letters	0	2	5	1	1
Total Complaints	~~51~~	~~71~~	~~50~~	~~31~~	~~179~~

More Complaints Than was Filed Against Leg

Confirmation process would curb judicial abuse

By REP. JOHN COWDERY, District 17

COMPASS

I am responding to the Compass piece written against HJR 47 by William Cotton, executive director of the Alaska Judicial Council (Daily News, Opinion, March 28). If passed by the voters, HJR 47 would make the governor's nominees to the Supreme Court, the Court of Appeals and the attorney members of the judicial council subject to legislative confirmation as the three public members of the judicial council are now.

Cowdery

Mr. Cotton feels that the judicial council sends only the most qualified applicants to the governor. He didn't mention that many attorneys refuse to apply for judgeships because of the council's perceived liberal bias. Mr. Cotton would have us believe that politics occurs only in legislative provinces but never in the executive or judiciary branches. Indeed, bar association politics in Alaska, like elsewhere, is legendarily robust.

The judicial council brandishes the real judicial selection power in Alaska. If the governor does not like the two or more candidates selected by the council, too bad. If you go to buy a car and there are only two on the lot, someone has effectively made your choice for you. In Alaska, that someone is the judicial council. With so much power at stake, you can bet your bottom dollar that legislative confirmation — public accountability — is the last thing it wants.

HJR 47 is the best of both worlds. It keeps the current merit system in place while adding the crucial step of legislative review to the appointment process. Through legislative hearings, judicial nominees would be given the opportunity to discuss their views on taxation, private property rights, child abuse, crime and punishment, environmental protection, etc. Some sitting judges are adamantly against this idea because they would not have been confirmed if the public knew what they stood for in advance of their appointment.

Mr. Cotton said that judges are accountable directly to the voters through "retention elections." When was the last time you reviewed a judge's record before voting? Retention elections are uncontested. They are a formality. There is no adversarial debate, no platform and no competition for ideas. Information is scarce. It is scantily distributed.

For instance, did you know that Chief Justice Allen Compton was found guilty of sexual harassment incidents in 1995 and 1996? Yet, Justice Compton was retained in November 1996 by a margin of 2 to 1. Voters did not have all the facts because the full story wasn't released until mid-1997 — after the election. When Justice Compton was found guilty he stepped down as chief justice, but stayed on the bench. It will be 10 years before he comes up for retention again. No one responsible for administering the law should enjoy that level of elite privilege.

The judicial council brandishes the real judicial selection power in Alaska. If the governor does not like the two or more candidates selected by the council, too bad. If you go to buy a car and there are only two on the lot, someone has effectively made your choice for you. In Alaska, that someone is the judicial council.

Mr. Cotton asserted that we are just trying to "control judges." This is the classic bogeyman tactic. Once a judge is confirmed, the Legislature would be out of the picture forever. I began work on HJR 47 in August of last year, months before the courts began their latest assault on publicly made law. The only thing I want to contain is the unfettered power of the judicial council to which Mr. Cotton is, understandably, very attached.

Mr. Cotton wrote that those who accuse the courts of "lawmaking" are just complaining because they do not agree with the decisions. This statement is based on the premise that justices have the authority to create constitutional law with a wave of their pen. Isn't the constitution supposed to be written by the people and interpreted by the judiciary? Mr. Cotton's attempt to trivialize our assertions is counterproductive to a meaningful discussion. I refuse to be painted into a corner.

No matter what side of the issue one is on, when the Alaska Supreme Court says that the privacy provision in Alaska's constitution guarantees a person's right to possess marijuana, despite statutes passed by the Legislature, that is lawmaking (Ravin vs. State).

When the judiciary specifies the dietary, educational and space needs of Alaska's criminals down to the food group, class and square foot, that is lawmaking (Cleary vs. Smith).

When the Alaska Supreme Court says that we cannot lease off-shore lands because the state did not consider the effect on caribou, that is bad judgment, not lawmaking (Trustees for Alaska vs. State).

There are many decisions I may not agree with; sometimes they are lawmaking, sometimes they're not. Mr. Cotton would have us blindly follow black robes and gavels all the way to judicial domination.

Alaska is a new state. Our judicial selection process is largely unproven by the test of time. The processes in 12 other states, as well as the federal confirmation process, do not violate the separation of powers doctrine. Neither would HJR 47. The Alaska judiciary's capricious use of authority and failure to appropriately censure the conduct of its members reveal a recurring pattern of power abuse. Legislative confirmation is not a panacea for all of Alaska's judicial ills, but I believe it is a measured step in the right direction.

Rep. John Cowdery of Anchorage is serving his third term in the state House of Representatives.