

HB

2000

<TARGET><BILL>HB 200</BILL><SUBJECT>HB
200</SUBJECT><COMM>HJUD28</COMM></TARGET>

ALASKA STATE LEGISLATURE

Interim:

600 East Railroad Avenue
Wasilla, Alaska 99654
Phone (907) 373-1842
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Session:

State Capitol Building
Juneau, Alaska 99801-1182
Phone: (907) 465-2186
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REPRESENTATIVE WES KELLER DISTRICT 7

SPONSOR STATEMENT HB 200

“An Act relating to the Alaska Judicial Council and to judicial retention elections.”

House Bill 200 is clarifying language on the public process involving the retention or removal comments on Alaska Judges. The Alaska Judicial Council provides information to the public about Judges, Magistrates, and Masters of the Court. The Council reviews information about these jurors and submits information to the Lieutenant Governor for inclusion in the election pamphlet. That information often goes beyond impartial and objective as it includes a recommendation to reject or retain a judge.

The question is, should a government agency be making such a recommendation or should they just provide the information received and investigated during the review process. House Bill 200 answers that question clearly by advising the Council not to include recommendation language.

The Alaska Judicial Council is a tool that gets information to the people. Alaskans who have limited or no interaction with the courts have little knowledge about the men and women sitting on the bench. Providing insight on the judicial members has become a goal for the Alaska Judicial Council. HB 200 does not change that.

HB 200 simply eliminates a recommendation to reject or retain a member of the Judiciary. It provides the facts to the public and lets them decide on their own.

E-Mail: Representative.Wes.Keller@akleg.gov
Call Juneau Toll free: (800) 468-2186
Website: www.housemajority.org/keller/

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REPRESENTATIVE WES KELLER DISTRICT 7 MEMO

To: Members of the Alaska Legislature

Date: April 9, 2013

Re: Sectional for House Bill 200 (28-LS-0736\A)

Section 1: Adds language to prevent recommendations on judges or justices to current restrictions on attempting to influence an election. It further includes those restrictions to The Alaska Judicial Council.

Section 2: Deletes the language that permitted recommendations in the election pamphlet..

Section 3: Specifies that the Judicial Council may not make recommendations on judicial officers and that all statements submitted to the public must be impartial and objective.

Section 4: Specifies that the Judicial Council may not make recommendations on Justices of the Supreme Court and that all statements submitted to the public must be impartial and objective.

Section 5: Specifies that the Judicial Council may not make recommendations on Judges of the Court of Appeals and that all statements submitted to the public must be impartial and objective.

Section 6: Specifies that the Judicial Council may not make recommendations on Superior Court Judges and that all statements submitted to the public must be impartial and objective.

Section 7: Specifies that the Judicial Council may not make recommendations on District Court Judges and that all statements submitted to the public must be impartial and objective.

Please note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

E-Mail: [Representative Wes Keller@legis.state.ak.us](mailto:Representative_Wes_Keller@legis.state.ak.us)
Call Juneau Toll free: (800) 468-2186
Website: www.akrepublicans.org/keller/

FISCAL NOTE

STATE OF ALASKA
2013 LEGISLATIVE SESSION

Bill Version HB200
 Fiscal Note Number _____
 () Publish Date _____

Identifier (file name) HB200-ACS-TRC-4-9-13 Dept. Affected Alaska Court System
 Title Relating to the Alaska Judicial Council and retention info. Appropriation Trial Courts
 Allocation _____
 Sponsor _____ Representative Keller
 Requester _____ OMB Component Number 768

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY14 Appropriation Requested	Included in Governor's FY14 Request	Out-Year Cost Estimates					
			FY14	FY15	FY16	FY17	FY18	FY19
OPERATING EXPENDITURES								
Personal Services								
Travel								
Services								
Commodities								
Capital Outlay								
Grants, Benefits								
Miscellaneous								
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		0.0	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS								
Full-time								
Part-time								
Temporary								

CHANGE IN REVENUES								

Estimated SUPPLEMENTAL (FY13) operating costs _____ (separate supplemental appropriation required)
 (discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY14) costs _____ (separate capital appropriation required)
 (discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? no
 If yes, by what date are the regulations to be adopted, amended, or repealed? _____ Discuss details in analysis section.

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version.

Prepared by Nancy Meade, General Counsel Phone 907-463-4736
 Division Alaska Court System Date/Time 4/9/13 5:00 PM
 Approved by Nancy Meade for Christine Johnson, Administrative Director Date 4/9/2013
Alaska Court System

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2013 LEGISLATIVE SESSION

BILL NO. HB200

Analysis

House Bill 200 would prevent the Alaska Judicial Council from making recommendations to the public relating to judges or justices seeking retention.

HB 200 would not have a fiscal impact on the Alaska Court System.

Judicial Retention Elections: Be An Informed Voter

Frequently Asked Questions:

1. What role do Alaska's citizens have in deciding whether judges should remain on the bench?

Alaska's citizens have the right to vote whether judges of the state courts of Alaska should remain in office. These are called "judicial retention elections" and give the public the right to decide if a judge is doing a good job or should be replaced. In the words of our constitution, they must "be subject to approval or rejection on a nonpartisan ballot" at the first general election held more than three years after their appointments.

2. What is the role of the Alaska Judicial Council in the judicial retention process?

The Alaska Judicial Council does a careful, thorough investigation of every judge standing for retention and makes recommendations to the public about whether a judge should be allowed to remain in office or should be replaced.

3. What information about judges is available to help voters make their decisions?

The Alaska Judicial Council makes the results of its investigations and its recommendations available on its website: www.aic.state.ak.us. In addition, the Alaska Court System provides information on its website about each of the judges who serve in the Alaska courts: <http://www.courts.alaska.gov/meet-ak-judges.htm>. Finally, information about each judge standing for retention is included in the State of Alaska's Voter Pamphlet that is mailed to each registered voter in Alaska. As a result of all these efforts and the constitutional structure of Alaska's judicial selection and retention process, Alaskans have the opportunity and ability to know more

4. Once the Alaska Judicial Council makes its recommendations which judges should be retained or removed from office, what things are done to make sure the voters of Alaska know about those recommendations before the election?

The Alaska Judicial Council's recommendations are posted on its website: www.aic.state.ak.us. The Council also sends out press releases that newspapers, radio and television stations can use in their news broadcasts and also places advertisements in the major newspapers of Alaska informing voters of its recommendations on each judge who is standing for retention. In addition, the regular staff members of the Council make the recommendations known when they are asked to give talks to community organizations and or appear on radio or television programs to discuss the work of the Alaska Judicial Council. All of these efforts help make sure that the voters of Alaska are well-informed about each judge before the election in which they vote to retain or replace a judge.

5. In what ways is a judicial retention election different from, and in what ways is it similar to, a traditional popular election?

A judicial retention election is different from a traditional popular election in a number of ways:

- because unlike most political candidates, judges do not run against anyone and are prohibited from campaigning by the Alaska Code of Judicial Conduct unless and until some person or organization does something to try to convince the voters to vote for the removal of the judge from office.

- because unlike in a political race, there is no deadline for declaring an intent to oppose a judge's retention. Combined with the ethical restrictions on judicial campaigning, this makes judges vulnerable to last-minute, unfair opposition campaigns.
- because judges don't take political positions in the retention process or campaign on issues other than their fitness as a judge.

A judicial retention election is also similar to a traditional popular election in a number of ways:

- because voters have a choice: YES or NO
- because judges can state their case to the public-- through advertising or other means-- IF THEIR RETENTION IS ACTIVELY OPPOSED
- and mostly, because....
- YOUR VOTE MAKES A DIFFERENCE!

Article 4

Section 8. Judicial Council.

The judicial council shall consist of seven members. Three attorney members shall be appointed for six-year terms by the governing body of the organized state bar. Three non-attorney members shall be appointed for six-year terms by the governor subject to confirmation by a majority of the members of the legislature in joint session. Vacancies shall be filled for the unexpired term in like manner. Appointments shall be made with due consideration to area representation and without regard to political affiliation. The chief justice of the supreme court shall be ex-officio the seventh member and chairman of the judicial council. No member of the judicial council, except the chief justice, may hold any other office or position of profit under the United States or the State. The judicial council shall act by concurrence of four or more members and according to rules which it adopts.

NOTES TO DECISIONS

Merit selection system held constitutional. - As long interpreted by the federal courts, the Equal Protection Clause does not preclude Alaska from choosing to use a merit system in selecting its judges. The lawyer members of the Judicial Council who are appointed by the bar association's governing body must be either popularly elected or appointed by an elected official; moreover, the ultimate power to appoint judges is with the Governor. *Kirk v. Carpeneti*, 623 F.3d 889 (9th Cir. 2010).

"Term". - With the exception of Alaska Const., art. IV, 4 and 13, wherever "term" or "service at the pleasure of " appears in the constitutional text originally adopted, the reference is to a period of service for a particular office. *Buckalew v. Holloway*, 604 P.2d 240 (Alaska 1979).

Meaning of phrase "position of profit". - See Begich v. Jefferson, 441 P.2d 27 (Alaska 1968).

And its intent. - The term "position of profit" was intended to prohibit all other salaried non-temporary employment under the United States or the State of Alaska. Begich v. Jefferson, 441 P.2d 27 (Alaska 1968).

Applied in Acevedo v. City of N. Pole, 672 P.2d 130 (Alaska 1983).

Quoted in Delahay v. State, 476 P.2d 908 (Alaska 1970).

Cited in Division of Elections v. Johnstone, 669 P.2d 537 (Alaska 1983); Abood v. Gorsuch, 703 P.2d 1158 (Alaska 1985).

Section 9. Additional Duties.

The judicial council shall conduct studies for improvement of the administration of justice, and make reports and recommendations to the supreme court and to the legislature at intervals of not more than two years. The judicial council shall perform other duties assigned by law.

NOTES TO DECISIONS

Declaration of candidacy. - Judicial council's purpose for the communications to two judges who were up for retention was most obviously to satisfy the council's own constitutional and statutory obligations; nothing implied a purpose of satisfying the candidates' obligations to the Division of Election to submit their declarations of candidacy. State v. Jeffery, 170 P.3d 226 (Alaska 2007).

Section 10. Commission on Judicial Conduct.

The Commission on Judicial Conduct shall consist of nine members, as follows: three persons who are justices or judges of state courts, elected by the justices and judges of state courts; three members who have practiced law in this state for ten years, appointed by the governor from nominations made by the governing body of the organized bar and subject to confirmation by a majority of the members of the legislature in joint session; and three persons who are not judges, retired judges, or members of the state bar, appointed by the governor and subject to confirmation by a majority of the members of the legislature in joint session. In addition to being subject to impeachment under Section 12 of this article, a justice or judge may be disqualified from acting as such and may be suspended, removed from office, retired, or censured by the supreme court upon the recommendation of the commission. The powers and duties of the commission and the bases for judicial disqualification shall be established by law.

Cross references. For provisions on the powers and duties of the Commission on Judicial Conduct, see AS 22.30.011; for proceedings when a successful candidate for judicial retention or the campaign treasurer or deputy campaign treasurer of such a candidate has been convicted of a violation of the state election campaign laws, see AS 15.13.380(i)(4).

Effect of amendments. The amendment effective October 11, 1968 (5th Legislature's 2d FCCS SCS CSHJR 74 (1968)) rewrote this section to establish the commission and provide for "disqualification" of judges. Formerly, this section dealt only with incapacity and retirement of judges.

The amendment, effective December 24, 1982 (12th Legislature's CSHJR 32 (Jud) am S (1981)), substituted "Conduct" for "Qualifications" following "Commission on Judicial," substituted "three persons who are justices or judges of the state courts" for "one justice of the supreme court" preceding "elected by the justices," substituted "and judges of the state courts" for "of the supreme court; three judges of the superior court, elected by the judges of the superior court; one judge of the district court, elected by the judges of the district court" following "elected by the justices," substituted "three" for "two" preceding "members who have practiced law," added "governor from nominations made by the" preceding "governing body of the organized bar," added "and subject to confirmation by a majority of the members of the

legislature in joint session" following "governing body of the organized bar" and substituted "three" for "two" preceding "persons who are not judges."

NOTES TO DECISIONS

Basis of 1968 amendment. - The Alaska Commission on Judicial Qualifications (now Commission on Judicial Conduct) was created by a constitutional amendment which became effective in 1968. This amendment is based on a 1966 revision of the judicial article of the California Constitution. In re Hanson, 532 P.2d 303 (Alaska 1975).

Scope of commission's powers. - This section only empowers the commission to recommend sanctions to the Alaska Supreme Court. Granting the commission the authority to impose sanctions is not permitted. In re Inquiry Concerning A Judge, 762 P.2d 1292 (Alaska 1988).

Ultimate authority vested in supreme court. - This section vests in the supreme court the ultimate authority in disciplinary matters affecting the judiciary. In re Hanson, 532 P.2d 303 (Alaska 1975).

This section and AS 22.30.070(c) unambiguously establish the supreme court of Alaska as the body entrusted with the ultimate dispositive decision in a judicial qualifications matter. In re Hanson, 532 P.2d 303 (Alaska 1975).

Power of supreme court to sanction judge under this section. - Concerning the subject of sanctions this section and AS 22.30.070(c)(2) provide that upon recommendation of the Commission on Judicial Conduct the supreme court of Alaska may suspend, remove, retire or censure a judge. In re Robson, 500 P.2d 657 (Alaska 1972).

Supreme court is to exercise independent judgment. - Normally considerable weight will be accorded to a given recommendation from the Commission on Judicial Qualifications (now Commission on Judicial Conduct), if supported by an adequate factual basis. Nevertheless, both this section and AS 22.30.070(c)(2) clearly establish that the supreme court of Alaska is to exercise its independent judgment in determining an appropriate sanction, if any, as to any recommendation made by the commission. In re Robson, 500 P.2d 657 (Alaska 1972).

The supreme court's scope of review in a judicial qualifications proceeding should be that of an independent evaluation of the evidence. In re Hanson, 532 P.2d 303 (Alaska 1975).

And cannot adopt commission's sanction recommendations automatically. - It would be tantamount to an abdication of its constitutional and statutory obligations if the supreme court were to adopt the sanction recommendations of the Commission on Judicial Qualifications (now Commission on Judicial Conduct) automatically. In re Robson, 500 P.2d 657 (Alaska 1972).

Substantial evidence test employed in reviewing commission's findings of fact. - Regarding the scope of review which the supreme court should exercise in reviewing findings of fact of the Commission on Judicial Qualifications (now Commission on Judicial Conduct), there is no reason to depart from the substantial evidence test which has heretofore been employed in reviewing matters coming to the supreme court from administrative agencies and other governmental bodies. In re Robson, 500 P.2d 657 (Alaska 1972).

Review of commission's recommendation is broader than substantial evidence criterion. - Under the discretionary grant of power to the supreme court under this section and AS 22.30.070(c)(2), supreme court review of a particular recommendation by the commission is necessarily broader than the substantial evidence criterion adopted for review of findings of fact made by the commission. In re Robson, 500 P.2d 657 (Alaska 1972).

Duties of supreme court in cases concerning punishment of judge. - In every case concerning the suspension, removal, retirement, or censorship of a judge, the supreme court must insure that procedural due process has been accorded the judicial officer proceeded against and that requisite findings of fact have been made and are supported by substantial evidence. The supreme court is further obligated to decide whether the commission's recommended sanction is justified by the record and is in accord with the objectives of the commission as reflected in the relevant constitutional and statutory provisions. In re Robson, 500 P.2d 657 (Alaska 1972).

Imposition of more serious sanction than censure. - Where judicial conduct which had been prejudicial to the administration of justice and had brought the judicial office into disrepute, was weighed against the relative judicial inexperience of petitioner at the time, the supreme court concluded that imposition of a more serious sanction than censure would be inappropriate. In re Robson, 500 P.2d 657 (Alaska 1972).

Supreme court sanction decision made part of public record. - Where the actions of a judge were serious enough infractions to justify its following the censure recommendation of the Commission on Judicial Qualifications (now Commission on Judicial Conduct), the supreme court was of the opinion that given the necessity for the creation of such a commission and the

need for enforcement of standards of judicial conduct and canons of judicial ethics, these ends were more fully served by making of record its sanction decision. By making its sanction part of the public record, the supreme court believed that the public's confidence would be maintained, both in the workings of the commission and in the ability of the judicial branch of government to insure its continued integrity. In re Robson, 500 P.2d 657 (Alaska 1972).

Applied in Buckalew v. Holloway, 604 P.2d 240 (Alaska 1979).

Quoted in Delahay v. State, 476 P.2d 908 (Alaska 1970).

Cited in Abood v. Gorsuch, 703 P.2d 1158 (Alaska 1985); In re Johnstone, 2 P.3d 1226 (Alaska 2000).

Collateral references. 46 Am.Jur.2d, Judges, 16 to 20.
48A C.J.S., Judges, 100, 101.

Confidentiality of proceedings or reports of judicial inquiry board or commission. 5 ALR4th 730.



**The Alaska Judicial Council recommends that Alaskans vote "YES" to retain
Fairbanks Superior Court Judge
Michael P. McConahy**

**Michael P. McConahy has been a Superior Court Judge since 2009.
He was appointed by Governor Sarah Palin.**

Alaska Judicial Council Evaluation Materials

- [Lower Court of Page](#) *(Council summary of the judge's performance)*
- [Attorney Survey Ratings](#) *(All surveys use a scale from 1 to 5, with 5 being the highest rating)*
- [Peace and Probation Officer Survey Ratings](#)
- [Social Worker and Guardian ad Litem Survey Ratings](#)
- [Juror Survey Ratings](#)
- [Court Employee Survey Ratings](#)
- [Survey Ratings from Previous Evaluations](#) - *(Standing for retention for the first time)*
- [Alaska Judicial Observers Ratings](#) - *(No ratings for this judge)*
- [Peremptory Challenge Rate](#) *(How often a party requested assignment of a new judge)*
- [Recusal Rate](#) *(How often a judge disqualified himself or herself due to a conflict of interest)*
- [Appellate Affirmance Rate](#) *(How often a trial judge was affirmed or reversed on appeal)*
- [Salary Warrant Withholdings](#) *(How often a judge's pay was withheld for unfinished work)*
- [Judge Questionnaire](#) *(Judge's response to a Judicial Council questionnaire)*
- [Survey Ratings for all Judges on the 2012 Ballot](#)

Alaska Judicial Council Web Page

Retention Evaluation Procedures

The legislature first authorized retention evaluations in 1976. The evaluation procedures have evolved since that time into a thorough, objective review of each judge. Revisions in the process have focused on broadening the scope and effectiveness of the evaluations. The Council also has improved its communication of evaluation information and recommendations to voters.

Judge's Questionnaire

Each judge is asked to fill out a short questionnaire about the types of cases he or she handled during the previous term, legal or disciplinary matters the judge may have been involved in, and health matters that could be related to the judge's ability to perform judicial duties. The questionnaire also asks the judge to describe satisfaction with judicial work during the previous term and to make any comments that would help the Council in its evaluations.

Attorney & Peace Officer Surveys

The Council surveys all active and all in-state inactive members of the Alaska Bar Association and all peace and probation officers in the state who handle state criminal cases. The survey asks about the judges' legal ability, fairness, integrity, temperament, diligence and administrative skills. An independent contractor carries out the surveys for the Judicial Council, to assure objectivity in the findings.

Social Worker, Guardian ad Litem (GAL) and Court Appointed Special Advocate (CASA) Surveys

The Council also surveys social workers and citizens who participate in helping Alaska's children as GALs and CASA volunteers. The survey is similar in content to the attorney and peace officer surveys. An independent contractor also carries out this survey for the Judicial Council.

Juror and Court Employee Surveys

The Council surveys all jurors who have served with the judges up for retention, as well as all court employees. These surveys give varied perspectives on the judges' performance.

Counsel Questionnaires

Each judge gives the Judicial Council a list of three trials, three non-trial cases, and any other cases that the judge found significant during his or her most recent term in office. The Council sends a brief questionnaire to all of the attorneys in each case. The questionnaire asks about the judge's fairness, legal abilities, temperament and administrative handling of the case.

Other Records

Council staff review a series of other public records, including conflict-of-interest annual statements filed with the Alaska Public Offices Commission and separate forms filed with the court system, court case files, and Commission on Judicial Conduct public files. The Council also reviews performance-related court data, such as the number of peremptory challenges filed against a judge, the number of times the judge recused him/herself and the number of reversals on appeal. The Council scrutinizes performance-related data carefully, because the type of caseload or a judge's location may play a major part in the numbers of challenges or appeals and reversals. A domestic relations judge assigned 6,000 cases in one year may have more challenges (and possibly more appellate reversals) than a judge handling 1,000 criminal and civil cases. These challenges may arise more from the nature of the cases than from the judges' decisions.

Public Hearings

The Council holds statewide public hearings for all judges standing for retention using the legislature's teleconference network and public meeting rooms. Statewide newspaper ads and public service announcements on radio stations encourage public participation. Public hearings give citizens a valuable opportunity to speak out about their experiences with judges. They also provide a forum in which citizens can hear the opinions of others. The Council tries to balance all the information it receives from all sources.

Interviews

Any judge may request an interview with the Judicial Council. The Council, in turn, may ask judges to speak with the Council members during the final stages of the evaluation process. Judges may respond to concerns raised during the evaluation process.

Other Publicity and Input

The Council widely publicizes the evaluation process through frequent press releases, personal contacts with radio and television stations, speeches to public groups such as community councils and feature articles in newspapers. Alaska Judicial Observers, a non-profit organization, provides independent observations of judicial performance.

Dissemination of Results

The Council meets in July to consider the information gathered and make retention recommendations. By law, the Council must make its evaluations and recommendations public at least sixty days prior to the election, and also must submit materials to the Lieutenant Governor's Official Election Pamphlet. The Council's evaluation information and recommendations are summarized in the Election Pamphlet. Extremely detailed evaluation materials on each judge are available on the website, or in printed form by calling the Council at 279-2526 in Anchorage or 1-888-790-2526 elsewhere in Alaska.



The Alaska Judicial Council Recommends Alaskans Vote "YES" to Retain all Judges on the 2012 Ballot

What is the Alaska Judicial Council?

The Alaska Judicial Council is a non-partisan independent citizens' commission created by the Alaska Constitution. Three non-attorney members are appointed by the governor subject to confirmation by the legislature. Three members are attorneys appointed by the Alaska Bar Association. These appointments are for staggered six year terms, must be spread over different areas of the state, and must be made without regard to political affiliation. The chief justice of the supreme court serves as chairperson. The chief justice only votes when his or her vote can make a difference.

The Judicial Council screens applicants for judicial vacancies and nominates the most qualified applicants for appointment by the governor, evaluates the performance of judges and recommends whether voters should retain judges for another term. It also conducts research to improve the administration of justice in Alaska.

Who is on the Alaska Judicial Council?

Walter L. Carpeneti as Chief Justice of the Alaska Supreme Court, was chair of the Judicial Council when it evaluated the performance of judges on the ballot in 2012. Before his appointment to the supreme court, he had served as a superior court judge in Juneau for seventeen years. (Term: 2009 - 2012). Dana Fabe became Chief Justice in July 2012 and currently chairs the Council.

William F. Clarke is a public member from Chugiak. He is a retired Air Force pilot and engineering marketing manager and has been a resident of Alaska for thirty-two years. (Term: 2008 - 2013)

Kevin Fitzgerald is an attorney member from Anchorage. He is a partner in Ingaldson, Maassen & Fitzgerald. He has practiced law since 1987 and is a second generation Alaskan. (Term: 2008 - 2014)

Ken Kreitzer is a public member from Juneau. Mr. Kreitzer has more than 27 years of public safety experience, including work as an airport safety officer, a corrections officer, a firefighter, EMT, a police officer and a court security officer. (Term: 2011 - 2017)

Almee Oravec is an attorney member from Fairbanks. Ms. Oravec has practiced law since 1999, and is a shareholder in Oravec Law Group. (Term: 2012 - 2018)

Kathleen Tompkins-Miller is a public member from Fairbanks. She is a schoolteacher and has been a resident of Alaska for sixteen years. (Term: 2009 - 2015)

Julie Willoughby is an attorney member from Juneau. Ms. Willoughby is in private practice in Juneau. She has practiced law since 1998 and is a second generation Alaskan. (Term: 2010 - 2016)

How Does the Judicial Council Evaluate Judges in Order to Make Recommendations to Voters?

The Judicial Council thoroughly reviews a judge's performance before the retention election. The Council surveys thousands

of Alaskans including police, peace and probation officers, court employees, attorneys, jurors, social workers and those who serve as guardians ad litem for children, asking them about their experience with the judges on the ballot. Those who appear frequently before the judges rate them on a number of criteria, including their legal ability, diligence, temperament, and fairness and may submit narrative comments about the judge's performance. The Council also solicits specific feedback from attorneys who appeared before the judge in recent cases and considers the ratings and observations of the Alaska Judicial Observers, an independent, community-based group of volunteers who attend courtroom proceedings and rate a judge's performance.

Among other materials, the Council also reviews how often the judge was disqualified from presiding over a case, how often a trial judge was affirmed or reversed on appeal, whether the judge has been involved in any disciplinary proceedings, and whether the judge's pay was withheld for an untimely decision. The Council may perform detailed follow-up investigations of any potential problem areas, and may conduct personal interviews with presiding judges, attorneys, court staff, and others about the judge's performance. The Council also holds a statewide public hearing to obtain comments about judges.

Council members meet before the retention election to discuss the information gathered for these judicial evaluations, and at the conclusion of the meeting, the Council publicly votes on its retention recommendations. Four votes by Council members are necessary for the Council to recommend for or against the retention of a judge.

Please see below for information about the Judicial Council's evaluations of individual judges. The Council's recommendations and summaries of its evaluations are included in the Official Election Pamphlet issued by the Division of Elections and distributed to Alaskan households statewide.

Where Can I Read about the Judicial Council's Evaluation of a Judge?

The following judges are on the ballot in 2012. Click on the name of a judge to read about the Council's evaluation of that judge.

Appellate Justices/Judges

Supreme Court Justice Daniel E. Winfree
Court of Appeals Judge Joel H. Bolger

First Judicial District

Superior Court Judge William Barker Carey - Ketchikan
District Court Judge Keith B. Levy - Juneau
District Court Judge Thomas G. Nave - Juneau

Second Judicial District

Superior Court Judge Michael I. Jeffery - Barrow

Third Judicial District

Superior Court Judge Steve W. Cole - Kodiak
Superior Court Judge Gregory Louis Heath - Palmer
Superior Court Judge Charles T. Huguelet - Kenai
Superior Court Judge William F. Morse - Anchorage
Superior Court Judge Frank A. Pfiffner - Anchorage
Superior Court Judge Eric Smith - Palmer
Superior Court Judge John Suddock - Anchorage
Superior Court Judge Sen K. Tan - Anchorage
Superior Court Judge Phillip R. Volland - Anchorage
Superior Court Judge Michael L. Wolverton - Anchorage
District Court Judge J. Patrick Hanley - Anchorage
District Court Judge Margaret L. Murphy - Homer
District Court Judge Daniel Schally - Valdez
District Court Judge Alex M. Swiderski - Anchorage
District Court Judge David R. Wallace - Anchorage
District Court Judge Pamela Scott Washington - Anchorage
District Court Judge David L. Zwink - Palmer

Fourth Judicial District

3/13/13

2012

Superior Court Judge Paul R. Lyle - Fairbanks
Superior Court Judge Michael P. McConahy - Fairbanks
District Court Judge Patrick S. Hammers - Fairbanks

Frequently Asked Questions

[Click here for answers to frequently asked questions.](#)

Alaska Judicial Council, 102# W Third Avenue, Suite 201 Anchorage, AK 99501
State of Alaska | Contact us | FAX (907) 276-5046 | Phone (907) 279-2526



Frequently asked Questions

Why should I care about retaining judges?

Chances are that you or a close friend or family member will appear before a judge at some point. Judges have the power to preserve your rights as a citizen, determine child custody and other important family matters, resolve business disputes both large and small, send people to jail, and make other decisions that affect people in fundamental ways. You do a public service to your fellow citizens by voting to retain judges who perform well and voting not to retain a judge who does not meet expectations.

How Does the Judicial Council Evaluate Judges in Order to Make Recommendations to Voters?

The Judicial Council thoroughly reviews a judge's performance before the retention election. The Council surveys thousands of Alaskans including police, peace and probation officers, court employees, attorneys, jurors, social workers and those who serve as guardians ad litem for children, asking them about their experience with the judges on the ballot. Those who appear frequently before the judges rate them on a number of criteria, including their legal ability, diligence, temperament, and fairness and may submit narrative comments about the judge's performance. The Council also solicits specific feedback from attorneys who appeared before the judge in recent cases and considers the ratings and observations of the Alaska Judicial Observers, an independent, community-based group of volunteers who attend courtroom proceedings and rate a judge's performance.

Among other materials, the Council also reviews how often the judge was disqualified from presiding over a case, how often a trial judge was affirmed or reversed on appeal, whether the judge has been involved in any disciplinary proceedings, and whether the judge's pay was withheld for an untimely decision. The Council may perform detailed follow-up investigations of any potential problem areas, and may conduct personal interviews with presiding judges, attorneys, court staff, and others about the judge's performance. The Council also holds a statewide public hearing to obtain comments about judges.

Council members meet before the retention election to discuss the information gathered for these judicial evaluations, and at the conclusion of the meeting, the Council publicly votes on its retention recommendations. Four votes by Council members are necessary for the Council to recommend for or against the retention of a judge.

As you can see, the Council makes an effort to publicize the information about the performance of judges on its website. The Council also advertises its recommendations. The Council's recommendations and summaries of its evaluations are included in the Official Election Pamphlet issued by the Division of Elections and distributed to Alaskan households statewide.

How often does the Judicial Council recommend against the retention of a judge?

The Alaska Judicial Council has not had to recommend against the retention of a judge very often. This is because Alaska has a system of selecting judges that is based on merit. Under our constitution, the Judicial Council screens applicants for judicial vacancies and nominates the most qualified applicants to the governor for appointment. The Council process focuses on an applicant's legal ability, temperament, integrity, fairness, and experience. The Council does a very thorough investigation into the qualifications of judicial applicants. By focusing on applicants' professional qualifications, Alaska's merit selection system has encouraged well-qualified attorneys to apply for judicial positions, and has preserved the fairness, impartiality, and independence of our courts.

Since 1976, the Judicial Council has recommended against a judge's retention eleven times. The Council recommended against the retention of a judge in 2006, 2008, and 2010. The other recommendations against the retention of a judge occurred in the 70's and 80's.

Why is it important to have an independent judiciary?

Alaska does not experience the problems that occur when elected judges make promises to, and raise money from people and attorneys who appear before them. In those states where judges are elected, special interests or political parties play a major role in the selection of judges. Alaska's judicial selection system avoids these problems by applying merit-based criteria when screening judicial applicants.

Getting a fair hearing in court is a cornerstone of our judicial system. When any of us appear in court, we must be assured that we will be treated impartially by an independent judge governed only by the rule of law. We need to know that we will be heard without regard to our wealth or social status or capacity to influence. An independent judiciary is essential to preserve the impartiality and fairness of justice in Alaska.

Our constitutional framers understood that an independent judiciary was needed to insure our system of checks and balances. As former United States Supreme Court Chief Justice William Rehnquist once said, "The Constitution protects judicial independence not to benefit judges, but to promote the rule of law. Judges are expected to administer the law fairly, without regard to public reaction."

Sometimes judges are asked to resolve contentious or divisive disputes involving social issues. As in all cases, a judge must do his or her best to fairly and impartially apply the law, even if it requires the judge to issue a decision that is not popular, or which conflicts with the judge's personal beliefs. Efforts to unseat a judge for political or ideological reasons may be aimed at affecting future decisions of other judges. Efforts to unseat a judge for political reasons diminish the neutrality and impartiality of our judiciary.

Please vote to support a fair and impartial judiciary.

How do I vote on judges?

In the general election on November 6th, you will be asked to vote "yes" or "no" to retain the trial judges eligible for retention in your judicial district. In addition, all Alaskans will be asked to vote "yes" or "no" to retain a justice on the Alaska Supreme Court and a judge on the Alaska Court of Appeals. Not all of Alaska's judges are on the ballot, only those whose most recent terms are expiring.

There are four judicial districts in Alaska. In the First Judicial District, trial judges from Juneau and Ketchikan will be on the ballot. In the Second Judicial District, the trial judge from Barrow will be on the ballot. The ballot in the Third Judicial District will include trial judges from Anchorage, Kenai, Kodiak, and Palmer. In the Fourth Judicial District, trial judges from Fairbanks will be on the ballot.

Alaska Judicial Council Recommendation

Judge Richard W. Postma, Jr. District Court, Anchorage

Judicial Council Recommendation 2010

The Alaska Judicial Council is a non-partisan citizens' commission established by the Alaska constitution. Alaskan law requires the Council to evaluate judges' performance and authorizes the Council to recommend to voters whether judges should be retained in office. The Judicial Council reviews judges' integrity, diligence, legal ability, fairness, demeanor, ability to manage their caseloads, and overall performance of their judicial responsibilities in and out of the courtroom.

After becoming aware of concerns about Anchorage District Court Judge Richard Postma's judicial performance, the Alaska Judicial Council conducted an independent review and met with Judge Postma to provide him with an opportunity to be heard. After that review and meeting, the Judicial Council found that Judge Postma has experienced persistent difficulty in coping with the Anchorage District Court caseload and stressful situations. Judge Postma has lacked patience, dignity, and courtesy in his communications which has contributed to constant friction between Judge Postma and other judges, court administrators, and court staff. Judge Postma has a tendency to lose his temper. Judge Postma's characterization of past events has often been inconsistent with other documented information. Judge Postma has prioritized his personal needs over his judicial responsibilities.

A different and separate state entity, the Alaska Commission on Judicial Conduct has constitutional responsibility to address problems of judicial conduct and responsibility. The Commission has found probable cause that Judge Postma violated Alaska law and Alaska's Code of Judicial Conduct by engaging in inappropriate communications with fellow judges and court staff and by willfully violating confidentiality requirements. The Commission has also found probable cause that Judge Postma's personal needs take precedence over his judicial duties and require unreasonable accommodations. An independent mental health expert retained by the Alaska Commission on Judicial Conduct has determined that Judge Postma suffers from a combination of mental health difficulties that is or may become permanent and which render him unable to fulfill the duties of his office.

The Alaska Court System, a third independent constitutional body, unsuccessfully attempted to work with Judge Postma to improve the situation. The court decreased the judge's responsibilities, placed the judge on paid administrative leave, and temporarily assigned the judge to a different venue. These efforts have not been successful in improving Judge Postma's ability to function as a judge on the Anchorage District Court.

Judges must be fair and judicial in the courtroom and in their conduct off the bench. The Alaska Judicial Council concludes that, while performing acceptably on the bench, Judge Postma demonstrated an inability to function appropriately with other judges and court staff and that he did so in a manner that seriously interfered with the performance of his judicial duties, disrupted the functioning of the Anchorage District Court, and makes him unfit to retain his office. The Judicial Council finds Judge Postma to be *Unqualified* and recommends with a 5-1 vote that the public vote "No" on his retention as a district court judge.

Summary of Survey Information

Survey respondents rated Judge Postma on the categories summarized in the table below, using 5 as the highest rating possible. The attorney rating for Judge Postma on overall performance was 3.7. Peace and probation officers gave Judge Postma a rating of 4.1. Jurors rated him 4.9 overall, and court employees gave him 3.1. No social workers, guardians ad litem or CASA volunteers rated Judge Postma. Alaska Judicial Observers rated him 2.86.

	Attorney Survey	Peace Officer Survey	Juror Survey	Court Employee Survey	Social Workers Guardians ad Litem CASAs
Legal Ability	3.9	--	--	--	--
Impartiality	3.8	4.1	4.9	3.4	--
Integrity	3.8	4.1	--	3.2	--
Temperament	3.7	4.0	5.0	3.0	--
Diligence	3.9	4.2	--	3.2	--
Overall	3.7	4.1	4.9	3.1	--

Ratings are based on a one to five scale. Five is the best rating and three is "acceptable."

Rating Scale
 5.0 = Excellent
 4.0 = Good
 3.0 = Acceptable
 2.0 = Deficient
 1.0 = Poor

Recommendation: Vote "NO" on the retention of Judge Richard W. Postma, Jr.

Alaska Judicial Council Recommendation

Judge Dennis P. Cummings, District Court, Bethel

Judicial Council Recommendation

The Alaska Judicial Council, a non-partisan citizens commission established by the Alaska constitution, evaluates judges on a number of criteria, including their legal ability, their demeanor, their diligence, their ability to manage their caseloads, and their fairness and integrity. After receiving a number of reports and comments from those who work with and appear before Bethel District Court Judge Dennis Cummings, the Judicial Council undertook an additional investigation including a review of court records and interviews with forty people. The Council reviewed a complaint issued by the Alaska Commission on Judicial Conduct that found probable cause to allege that Judge Cummings had violated several Canons of Judicial Conduct relating to ex parte contact with a state witness in a criminal trial. The Council also reviewed Judge Cummings' response to that complaint. The Council considered ratings from attorneys statewide who rated Judge Cummings "below acceptable" in the areas of Legal Ability and Temperament. Among attorneys in the Fourth Judicial District, where Judge Cummings presides, the judge received ratings that were substantially "below acceptable" on Legal Ability, Impartiality, Temperament, and Overall Performance. Based on this investigation and a meeting with Judge Cummings in which he had an opportunity to respond, the Judicial Council had considerable concerns about Judge Cummings' lack of impartiality, inappropriate ex parte contact, inability to control the courtroom, inadequate legal knowledge, and lack of candor. The Judicial Council finds Judge Cummings to be *Unqualified* and recommends unanimously that the public vote "No" on his retention as a district court judge.

Judicial Council Evaluation

The Judicial Council surveyed 2,884 attorneys and 1,539 peace and probation officers, together with social workers/guardians ad litem, and child advocates, jurors, and court employees about the judges on the ballot. Respondents were asked to rate judicial performance and to submit comments. The Council reviewed court system records concerning peremptory challenges, recusals, and appellate affirmance and reversal rates; any civil or criminal litigation involving the judge; APOC and court system conflict-of-interest statements; any public disciplinary files; and whether a judge's pay was withheld for an untimely decision. The Council investigated judicial conduct in specific cases. The Council interviewed some judges, attorneys, court staff, and others, and held a statewide public hearing to obtain comments about judges.

	Attorney Survey	Peace Officer Survey	Juror Survey	Court Employee Survey	Social Workers Guardians ad Litem CASAs
Legal Ability	2.9	---	---	---	---
Impartiality	3.2	3.8	4.2	3.8	---
Integrity	3.8	4.0	---	3.9	---
Temperament	2.9	3.7	4.4	3.3	---
Diligence	3.2	4.0	---	3.7	---
Overall	3.0	3.9	4.3	3.5	---

Ratings are based on a one to five scale. Five is the best rating and three is "acceptable."

Rating Scale

5.0 = Excellent
 4.0 = Good
 3.0 = Acceptable
 2.0 = Deficient
 1.0 = Poor

Summary of Survey Information

Attorneys in Alaska rated Judge Cummings on the six categories summarized in the table above, using 5 as the highest rating possible. The attorney rating for Judge Cummings on overall performance was 3.0. Peace and probation officers rated Judge Cummings on five categories. They gave Judge Cummings a rating of 3.8. Jurors rated Judge Cummings 4.3 overall and court employees gave him 3.5. There were no social workers, guardians ad litem or CASA volunteers who rated Judge Cummings.

Recommendation: Vote "NO" on the retention of Judge Dennis P. Cummings

Contact the Judicial Council at 1029 W. Third Avenue, Suite 201, Anchorage, AK 99501 (telephone: (907) 270-2526) for more detailed information, or review the information on our internet site at: www.aic.state.ak.us

Alaska Judicial Council Recommendation

Judge David S. Landry, District Court, Kenai

Judicial Council Recommendation

The Alaska Judicial Council, a non-partisan citizens commission established by the Alaska constitution, evaluates judges on a number of criteria, including their legal ability, their demeanor, their diligence, their ability to manage their caseloads, and their fairness and integrity. After receiving a number of reports and comments from those who work with and appear before Judge Landry, the Judicial Council undertook an additional investigation including a review of court records and interviews with over forty people. The Judicial Council's vote relied only on evidence that was corroborated. Based on this investigation, the Judicial Council had considerable concerns about Judge Landry's pattern of poor judgment in a number of areas including: inappropriately delegating judicial authority by handing out blank pre-signed orders to prosecutors, which allowed them to set bail and schedule hearings without further court order; while administering the criminal court calendar, failing to monitor and ensure the timely trial of criminal cases, resulting in dismissal of at least fourteen criminal cases within a year for failure to provide a speedy trial under applicable court rules; making inappropriate sexual comments both in and out of the courtroom, which continued after receipt of warnings; and creating the appearance of favoritism and partiality in handling court cases. The Judicial Council finds Judge Landry to be *Unqualified* and recommends unanimously that the public vote "No" on his retention as a district court judge.

Judicial Council Evaluation

The Judicial Council surveyed 3,036 attorneys, 1,492 peace and probation officers, social workers/guardians ad item, and child advocates, jurors, and court employees about the judges on the ballot. Respondents were asked to rate judicial performance and to submit comments. The Council also reviewed the ratings and observations of the Alaska Judicial Observers, independent community-based volunteers. The Council reviewed court system records concerning peremptory challenges, recusals, and appellate affirmance and reversal rates; any civil or criminal litigation involving the judge; APOC and court system conflict-of-interest statements; any disciplinary files; and whether a judge's pay was withheld for an untimely decision. The Council investigated judicial conduct in specific cases. The Council interviewed some judges, attorneys, court staff, and others. The Council held a statewide public hearing to obtain comments about judges.

	Attorney Survey	Peace Officer Survey	Juror Survey	Court Employee Survey	Social Workers Guardians ad Litem CASAs
Legal Ability	3.7	—	—	—	—
Impartiality	3.9	4.1	4.8	3.5	5.0
Integrity	4.1	4.3	—	3.6	5.0
Temperament	4.1	4.4	4.9	3.8	5.0
Diligence	3.8	4.1	—	3.5	5.0
Overall	3.8	4.2	4.8	3.7	5.0

Ratings are based on a one to five scale. Five is the best rating and three is "acceptable."

Rating Scale
 5.0 = Excellent
 4.0 = Good
 3.0 = Acceptable
 2.0 = Deficient
 1.0 = Poor

Summary of Survey Information

Attorneys in Alaska rated Judge Landry on the six categories summarized in the table above, using 5 as the highest rating possible. The attorney rating for Judge Landry on overall performance was 3.8. Peace and probation officers rated Judge Landry on five categories, using the 5-point scale above. They gave Judge Landry a rating of 4.2. Three other groups also evaluated Judge Landry's performance, using the same 5-point scale with 5 as the highest rating. Jurors rated him 4.8, court employees gave him 3.7, and social workers, guardians ad litem and CASA volunteers rated him at 5.0.

Recommendation: Vote "NO" on the retention of Judge David S. Landry

Contact the Judicial Council at 1029 W. Third Avenue, Suite 201, Anchorage, AK 99501 (telephone: (907) 270-2526) for more detailed information, or review the information on our internet site at: www.aic.state.ak.us

November 2006

Alaska Judicial Council Recommendation

Judge Michael P. McConahy, Superior Court, Fairbanks

Judicial Council Recommendation 2012

The Alaska Judicial Council is a non-partisan citizens' commission established by the Alaska constitution. Alaskan law requires the Council to evaluate judges' performance and authorizes the Council to recommend to voters whether judges should be retained in office. The Judicial Council reviews judges' integrity, diligence, legal ability, fairness, demeanor, ability to manage their caseloads, and overall performance of their judicial responsibilities in and out of the courtroom. The Judicial Council finds Judge McConahy to be *Qualified* and recommends unanimously that the public vote "Yes" to retain him as a superior court judge.

Judicial Council Evaluation

The Judicial Council surveyed thousands of Alaskans including peace and probation officers, court employees, attorneys, jurors, social workers and guardians ad litem about the judges on the ballot. Respondents were asked to rate judicial performance and to submit comments. The Council also reviewed the ratings and observations of the Alaska Judicial Observers, independent community-based volunteers. The Council reviewed the judge's peremptory challenge, recusals, and appellate affirmance and reversal rates; any civil or criminal litigation involving the judge; APOC and court system conflict-of-interest statements; any disciplinary files involving the judge; and whether a judge's pay was withheld for an untimely decision. The Council reviewed other court records and investigated judicial conduct in specific cases. The Council interviewed some judges, attorneys, and court staff, and held a statewide public hearing to obtain comments about judges.

	Attorney Survey	Peace Officer Survey	Juror Survey	Court Employee Survey	Social Workers Guardians ad Litem
Legal Ability	4.2	—	—	—	—
Impartiality	4.2	4.2	4.8	4.3	3.5
Integrity	4.3	4.3	—	4.3	4.0
Temperament	4.3	4.2	4.9	4.1	4.0
Diligence	4.3	4.2	—	4.2	3.5
Overall	4.2	4.3	4.9	4.2	4.0

Ratings are based on a one to five scale. Five is the best rating and three is "acceptable."

Rating Scale
 5.0 = Excellent
 4.0 = Good
 3.0 = Acceptable
 2.0 = Deficient
 1.0 = Poor

Summary of Survey Information

Survey respondents rated Judge McConahy on the categories summarized in the table above, using 5 as the highest rating possible. The attorney rating for Judge McConahy on overall performance was 4.2. Peace and probation officers gave Judge McConahy a rating of 4.3. Jurors rated him 4.9 overall, court employees gave him 4.2, and social workers and guardians ad litem rated him at 4.0.

Recommendation: Vote "YES" to retain Judge Michael P. McConahy

For more information go to
www.knowyouralaskajudges.com



alaska judicial council

1029 W. Third Avenue, Suite 201, Anchorage, Alaska 99501-1969
<http://www.ajc.state.ak.us>

(907) 279-2526 FAX (907) 276-5046
E-mail: postmaster@ajc.state.ak.us

March 15, 2013

Senator Pete Kelly
State Capitol, Room 404
Juneau, Alaska 99801-1182

Dear Senator Kelly,

You and other legislators have expressed concern about Judicial Council advertising last fall that responded to opposition to Judge Tan's retention. We now understand that concern.

In 2012, the Council spent about \$3,800 on six ads that specifically referenced Judge Tan. We had previously understood that the funding could be used to respond to opposition to a justice or judge recommended for retention. Historically, the Council has advertised in these situations, including responding to opposition to the retention of Justices Rabinowitz, Matthews, Fabe, and several superior court judges. The legislature has always provided the Council with funding to advertise information about its judicial performance evaluations and its retention recommendations in order to help voters make informed decisions when they vote on retention.

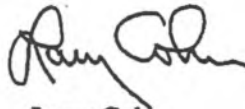
Now that legislators have clarified that they do not intend for us to use retention advertising funding to respond to opposition to a judge or justice, we will not do so. The Council will use its advertising to publicize its recommendations and the information upon which the Council relied in making its recommendations, and to inform the public about our evaluation process.

As you know, the Judicial Council requires advertising funding for reasons other than to publicize its retention recommendations and judicial evaluation process. For each judicial vacancy, the Council conducts a public hearing in the location of the vacancy to obtain public comment about the qualifications of applicants. The Council must advertise the time and location of these public hearings. These hearings provide important feedback to Council members about the qualifications of applicants and the needs and perspectives of the community. These public hearings enable the community to be engaged in the judicial selection process. Recently, dozens of Alaskans testified in each of the public hearings held in Nome, Dillingham, and Bethel.

When the Council evaluates the performance of judges, it holds public hearings throughout the state to solicit public comment. Recognizing the importance of the public's role in our process, the legislature has allowed the Council to use LJO offices at no cost to conduct these hearings. The Council advertises the dates and times of these hearings and to solicit other public comment about the performance of our judges. In 2012, the Council advertised in about two dozen newspapers statewide and hearings were held in twenty-two locations.

At your suggestion, I will work with Senator French to provide you with any information that you might find helpful when considering the Council's need for advertising funds. We look forward to continuing to work with you on these issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Larry Cohn". The signature is fluid and cursive, with the first name "Larry" and the last name "Cohn" clearly distinguishable.

Larry Cohn
Executive Director

cc: Chief Justice Dana Fabe
Chair *ex officio* of the Alaska Judicial Council
Council Members

**The Alaska Judicial Council
recommends that you vote "YES"
to retain ALL judges on the ballot**

Supreme Court Justice Daniel Winfree
Fairbanks Superior Court Judge Paul Lyle
Fairbanks Superior Court Judge Michael McConahy
Fairbanks District Court Judge Patrick Hammers

What is the Alaska Judicial Council? A non-partisan independent citizens' commission created by our constitution. Members, including attorneys and non-attorneys, are from different areas of the state. To help you make informed decisions, the Council is required to evaluate the performance of judges and recommend whether voters should retain them for another term.

How does the Council evaluate judges? By conducting a thorough investigation, including surveys of thousands of Alaskans such as police officers, court employees, attorneys, jurors, and social workers.

To get **non-political** information about the performance of judges go to:

knowyouralaskajudges.com

Paid for by the Alaska Judicial Council, 1029 W. 3rd Ave., Anchorage, AK.

*AJC Recommendations
Printed in*

*Fairbanks
News-Miner*

FAIRBANKS DAILY NEWSMINER
2 column by 5 inch

AJC Recommendations
Printed in
Anch Daily News

**The Alaska Judicial Council
recommends that you vote "YES"
to retain ALL judges on the ballot.**

What is the Alaska Judicial Council? It is a non-partisan independent citizens' commission created by our constitution. Members are from different areas of the state including non-attorneys and attorneys. To help voters make informed decisions, the Council is required by law to evaluate the performance of judges and recommend whether voters should retain them for another term.

How does the Council evaluate judges? By conducting a thorough investigation, including surveys of thousands of Alaskans such as police officers, court employees, attorneys, jurors, and social workers.

To get **non-political** information about the performance of judges go to:

knowyouralaskajudges.com

Paid for by the Alaska Judicial Council, 1029 W. 3rd Ave., Anchorage, AK.

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Part III

Judicial Performance Evaluations 2011-2012

A. Retention Election Evaluations

1. Introduction

Alaska's constitution and statutes require each judge periodically to stand for retention at the general election. The lengths of terms vary with the judicial position, with all judges serving a shorter initial term, and longer terms after the first retention. Statutes passed in 1975 require the Judicial Council to evaluate each judge standing for retention, and to make the results of the evaluations known to the public. The Council also recommends a "yes" or "no" vote on each judge to the voters, and publicizes its decisions.

Appendix F contains the retention election history for current judges. Lists of judges eligible to stand for retention in 2014 and 2016 are in Appendix G. Appendix H summarizes historical results of the Council's performance evaluations for retention. A history of retention votes from 1976 through 2012 may be found on the Council's website.

2. Evaluation Procedures

In 2012, the Judicial Council surveyed all active (and in-state inactive) members of the Alaska Bar Association, and all peace and probation officers in the state. The Council sent surveys to 3,029 attorneys (24.6% response rate) and 1,632 peace and probation officers (18.8% response rate). An independent contractor handled the surveys for the Judicial Council to assure objectivity in the findings. Survey respondents provided ratings and comments about judges' legal abilities, fairness, integrity, temperament, diligence, and overall performance. Similar surveys went to 123 social workers and guardians ad litem (advocates for Alaska's abused and neglected children and incapacitated adults) (32.5 % response rate). The Council asked jurors who had served on cases with the judges to rate and comment on the judges' abilities to handle trials fairly and capably (1,585 responded). The Council also surveyed 668 non-attorney court employees (43% response rate). The Council mostly used electronic surveys unless it was not feasible to do so.

Each judge standing for retention returned a self-evaluation questionnaire to the Judicial Council. The questionnaire included lists of recent cases that the judge believed were important for evaluation, with an emphasis on jury and non-jury trials. The Council asked each attorney in each

case to fill out an additional survey about the judge's performance in that particular case, including detailed comments about the judge's abilities.

Council staff reviewed a series of other public records, including conflict-of-interest annual statements filed with the Alaska Public Offices Commission and separate forms filed with the court system; court case files; disciplinary proceedings; and a report on any withheld salary warrants. The Council also reviewed performance-related court data, such as the number of peremptory challenges filed against a judge, the number of times a judge recused himself or herself from presiding over a case, and how frequently the judge was reversed on appeal in civil and criminal cases. The Alaska Judicial Observers, an independent group of community-based volunteer court observers, provided ratings and observations about judges in Anchorage, Kenai, and Palmer whom they had evaluated.

The Council widely publicized the evaluation process. The Council held statewide public hearings for public comment on all judges standing for retention, using the legislature's teleconference network and public meeting rooms. Statewide newspaper ads encouraged public participation. The Council solicited comments about judges on its website.

Council staff investigated specific issues by reviewing case files, listening to court proceedings, reviewing personnel files and medical records, and interviewing judges, attorneys, court administrators, and others. Council members interviewed some judges.

The Council made its retention evaluation information widely available to the public. The Official Election Pamphlet sent to each Alaska voter included a page summarizing the Council's performance evaluation materials on each judge. The Council published comprehensive materials, and posted most non-confidential information on its retention home page (knowyouralaskajudges.com). In 2012, the Council placed a series of ads in most of the state's newspapers during the weeks before the November election, ran radio ads in the Third and Fourth Judicial Districts, and engaged in community outreach. A detailed description of the Council's retention evaluation process is in Appendix E and on the Council's website.

3. Recommendations

Twenty-six judges stood for retention in 2012: one supreme court justice, one court of appeals judge, three trial court judges in the First Judicial District (one superior court, two district court), one in the Second District, seventeen in the Third District (ten superior court, seven district court), and three in the Fourth District (two superior and one district). The Council found all of the judges qualified and recommended that they be retained.

4. Election Results

a. Summary

Voters retained all of the judges recommended by the Council with yes vote percentages ranging from 55.1% to 76.5%.

b. Yes Vote Percentages for the Various Courts

1. Appellate Courts

Supreme Court: The percentage of yes votes for supreme court justices tends to vary more by year than for most other judicial positions. The reasons are often related to issues other than the evaluations of the justices standing in a particular year. In 2012, Justice Winfree was retained with 64.9% yes votes, within the 64% to 69% range for unopposed justices.

Court of Appeals: The percentage of yes votes for court of appeals judges ranges between 60.7% and 65.5%, a slightly lower range than that for the supreme court justices. Judge Bolger was retained with 65.2% yes votes.

2. First District

Voters in the First Judicial District retained the three judges with comfortable margins. Judge William Barker Carey, Ketchikan Superior Court, had 74.6% yes votes. Both Juneau District Court Judges Keith Levy (76.6%) and Thomas Nave (75.7%) were retained.

3. Second District

Judge Michael Jeffery was retained with a yes vote percentage of 74.0%.

4. Third Judicial District

Seventeen judges in the Third District stood for retention, ten from the superior courts and seven from the district courts. All were recommended for retention by the Judicial Council, and all were retained.

Superior Court: Notably, with the exception of Anchorage Judge Sen Tan, the Third District superior court judges as a group had yes vote percentages higher than in 2006, 2008, or 2010. The four superior court judges from outside Anchorage were retained without opposition, and with yes

vote percentages well within the usual range for the district.³ The six superior court judges from Anchorage also all were retained, one with substantial opposition and two with minor opposition.⁴

Anchorage Judge William Morse was opposed by a single individual who campaigned against the judge citing rulings in a 2008 Municipality of Anchorage elections case. Judge John Suddock was opposed in an email campaign, based on perceptions about his decisions in family law cases. Both were retained, Judge Morse with 62.7% yes votes, and Judge Suddock with 61.6% yes votes.

Judge Sen Tan was opposed in a campaign that became public in mid-October, about three weeks before the election. The campaign, primarily funded by the 501(c)(4) political arm of a non-profit corporation, used mass mailings, email and social media messages, radio ads, large public banners, press releases, and newspaper columns to communicate its views. The opposition cited two family law cases decided by Judge Tan more than ten years earlier in which the judge's rulings were affirmed by the Alaska Supreme Court. A group of Alaskans organized a campaign to retain Judge Tan, as is permitted by the canons of judicial ethics. They relied primarily on social media to communicate with voters. In limited newspaper advertising, the Judicial Council reiterated its recommendation that Judge Tan be retained, and reiterated his high ratings from persons with professional experience with the judge, including perfect ratings from advocates for abused and neglected children. Judge Tan was retained with 55.1% yes votes.

District Court: Historically, district court judges in the Third Judicial District have received slightly higher yes vote percentages than superior court judges from the same district. In 2012, the district court's judges were retained with yes vote percentages from 63.9% to 66.9%, well within the expected range.⁵ None were opposed.

5. Fourth District

Three judges in the Fourth Judicial District stood for retention, all in Fairbanks, and all for the first time. Superior Court Judges Paul Lyle (66.7%) and Michael McConahy (67.6%), and District Court Judge Patrick Hammers (68.8%) all were retained with yes vote percentages in the usual range for the Fourth Judicial District.

³ They were Steve Cole, (64.5%, Kodiak), Gregory Heath (64.1%, Kodiak), Charles Huguelet (63.0%, Kenai), and Eric Smith (63.3%, Palmer).

⁴ The three Anchorage superior court judges who were unopposed were Judges Frank Pfiffner (63.2%), Judge Phillip Volland (63.8%), and Judge Michael Wolverton (64.7%).

⁵ Third District district court judges included Patrick Hanley (66.9%, Anchorage), Margaret Murphy (64.8%, Homer), Daniel Schally (63.9%, Valdez), Alex Swiderski (64.1%, Anchorage), David Wallace (65.9%, Anchorage), Pamela Scott Washington (66.2%, Anchorage), and David Zwink (65.0%, Palmer).

MEMORANDUM

To: Senator Pete Kelly
Copy: Heather Shadduck
From: Mike Pauley, Alaska Family Action
Date: March 28, 2013
Re: Senate Bill 76

Thank you for introducing SB 76, concerning involvement of the Alaska Judicial Council in retention elections. We believe that passage of this legislation is essential for restoring fairness to the process of retention elections.

This memo offers background information that helps delineate the importance of this issue, and also seeks to respond to some of the criticism that has been expressed regarding SB 76.

Summary

State government has an important responsibility to provide voters with critical information related to candidates and issues that appear on election ballots. However, respect for the democratic process should preclude the government from ever "advising" citizens on how they are to vote on any candidate or issue.

Alaska is one of the few states in the country where an agency of state government, the Judicial Council, actually expends public funds for the specific purpose of telling the public how they should vote.

This is grossly unfair to voters, who deserve the right to make a decision about retention without the state using the voters' money to tell them how they should cast their ballots. The use of state funds to promote a "yes" vote on virtually all judges has, with rare exceptions, turned the biennial retention elections into largely a "rubber stamp" process. This sort of electoral process was justly ridiculed when utilized by countries like the former Soviet Union, or present day Cuba.

According to the American Judicature Society (www.judicialselection.us), the Alaska Judicial Council's practice of making retention recommendations was an innovation that began in 1976. It was not part of the judicial retention process in the first chapter of statehood following the constitutional convention.

It is the position of Alaska Family Action that voters would be well-served if we returned to the pre-1976 system, where state government respected the intelligence of voters and did not attempt

to interfere with the decision-making process as to whether a particular judge or justice should be retained.

Discussion of National Context

Alaska's practice of using state funds to evaluate judges and then provide voters a "yes" or "no" recommendation is unusual. According to the Institute for the Advancement of the American Legal System at the University of Denver (iaals.du.edu), there are only 7 states (including Alaska) where a government-sponsored evaluation of judges is provided to voters:

Alaska
 Arizona
 Colorado
 Missouri
 New Mexico
 Tennessee
 Utah

However, even among this minority of states, there are important differences. In Arizona, the evaluation provided to voters does not include a vote "yes" or "no" recommendation. Instead, the Arizona Commission on Judicial Performance Review (www.azjudges.info) simply tells voters whether they feel a judge/justice "meets judicial performance standards" or "does not meet judicial performance standards." Although this still exerts a problematic influence on retention elections, it at least shows more respect for the independence of voters as compared to the Alaska system.

Also, there are important differences in how judicial performance information is communicated to voters. The Alaska system involves the expenditure of public funds to send the "yes" or "no" vote recommendations to every registered voter via the Division of Elections voter pamphlet. In addition, the Alaska Judicial Council has routinely spent public funds on newspaper ads and other media advertising its vote recommendations.

The author's research shows that only three other states – Arizona, Colorado, and Utah – actually provide the judicial evaluation data in the voter pamphlet. The other states – Missouri, New Mexico, and Tennessee – make the recommendations available in a more passive manner, by posting the information on a website.

Because Arizona does not explicitly advise voters to cast a "yes" or "no" ballot, this means that only 3 out of 50 states – Alaska, Colorado and Utah – have a statutory scheme that involves all of the following:

- a) A state-designed and state-financed process for evaluating judges;
- b) Legal authorization for the evaluating commission to actually tell voters whether they should cast a "yes" or "no" vote; and
- c) A state-funded scheme for actively disseminating these vote recommendations to every registered voter in the state.

Note: The list of states providing voters with retention recommendations formerly included Kansas. However, in 2011, the Legislature eliminated all funding for the Kansas Commission on Judicial Performance (www.kansasjudicialperformance.org), a move spurred in part by voter anger over the state using public funds to tell people how to vote.

Flaws in the Judicial Council's Evaluation Process

The Alaska Judicial Council's retention recommendations arise from an evaluation process that is severely deficient because it includes no analysis of a judge or justice's overall "judicial philosophy" regarding the proper methodology for interpreting statutory and constitutional provisions. This is a fatal flaw, because no other aspect of judicial performance has a greater potential to impact the lives of *all* Alaskans – not just those who happen to find themselves in a courtroom at some point in their lives.

Does the record show that a given judge or justice is a so-called "strict constructionist" in his or her methodology for interpreting the constitution and statutes? Or is the judge or justice an "originalist" or a "textualist" or an "activist"? Does he or she believe in the "living Constitution" concept? One can perform a Google search on any of these terms and read literally hundreds of articles, both academic and popular, that illustrate the crucial importance of these categories.

On the U.S. Supreme Court these schools of thought will determine, for example, whether a majority of the Justices will decide that the federal constitution contains a right to abortion, or a right for homosexuals to be issued marriage licenses. It will determine whether a judge or justice is more like an Antonin Scalia (a textualist) or a Ruth Bader Ginsburg (a "living Constitution" adherent).

This issue of judicial philosophy is the proverbial "elephant in the room" that the Alaska Judicial Council wants to pretend is simply a non-issue in retention elections. The Judicial Council staff and other legal elites typically act as if judicial philosophy ought never to influence a voter's decision to cast a "yes" or "no" ballot. They think voters should concern themselves only with what the Judicial Council thinks is important, such as their surveys asking social workers or court employees to rate judges – as if the opinions of these groups were somehow more worthy of consideration than the opinions of any other group in society (say, business people, property owners, natural resource industry employees, doctors, parents, pastors, etc.).

Legal elites in Alaska and elsewhere in the U.S. believe it is essential to instruct voters on how they should cast their ballots, because they think they know better than voters about how to fairly evaluate the record of a judge or justice. This is an inherently elitist argument; if it were true, it would actually be a better argument for dispensing with retention elections altogether. Why even bother consulting voters when they can't be trusted to make an informed decision without "hand holding" by their intellectual betters?

Regardless of what the legal elites think, there is ample evidence that most voters do believe that judicial philosophy is a valid reason to retain or reject a judge. There is increasing voter

frustration with judges who act like “super legislators,” enacting sweeping political or cultural changes without any legal or constitutional authority to undergird their decisions.

Retention elections offer voters an important mechanism for ridding the bench of activist judges. The most notable example from recent history occurred in the state of Iowa in 2010, when voters threw out three justices of the state Supreme Court after they proclaimed a new constitutional right for homosexuals to be married. Thankfully, Iowa is among the majority of states that do not use taxpayer dollars to lecture voters about how they should cast their ballots. The 2010 results in Iowa might have been different if the state government had spent public funds to influence the outcome of the election.

Spotlight on Contested Retention Elections in Alaska

There have been several efforts over the years by groups of Alaskans to remove judges or justices from the court, because of disagreements over judicial philosophy. This is an entirely legitimate reason to oppose or favor retaining a judge – yet in each case these citizen groups have had to do battle with the state government (in the form of the Judicial Council), which uses their money to campaign against what they are trying to achieve. It matters not whether any person agrees with the views of a group seeking to non-retain a judge. The salient point is that they have a right to make their case to voters based on the merits of their issues – without the state using taxpayer funds to nullify their cause.

Although not an exhaustive list, the following are examples of contested retention campaigns in recent history.

2000 – Supreme Court Justice Dana Fabe

YES: 57%

NO: 43%

Notes: From 1976 to the present, the average “yes” vote on a Supreme Court Justice (excluding Dana Fabe’s two retention elections in 2000 and 2010) has been 64.8%. Fabe’s 57% yes vote in 2000 was the lowest received by any Supreme Court Justice since 1980.

Opposition to Fabe came from the group Alaskans for Judicial Reform, and arose from public backlash to several of her controversial rulings:

- 1) **Prisoners’ Rights (1998):** In one of the most shocking cases of judicial arrogance in Alaska (and U.S.) history, Fabe and a majority of the justices then serving on the Supreme Court ruled that Alaska voters would be *prohibited* from voting on a proposed amendment that limited the rights of prisoners (*Bess v. Ulmer*, 985 P.2d 979). This amendment, SJR 3, was approved by overwhelming majorities in the Senate and House and was due to be placed before voters for their consideration in the November 1998 statewide election. Fabe and her colleagues knocked the measure off the ballot – using the perfidious justification that the amendment – which was *one sentence long* – was actually a “revision” of the constitution, not an amendment. (Revisions of the

constitution can be approved only through a constitutional convention). Through this ruling, the Supreme Court has set a precedent that allows them to kill any future proposed constitutional amendment that they strongly disapprove of – they need merely to rule that the amendment is a “revision” rather than an amendment. Thus, with the stroke of a pen they can deprive voters of the right to amend a constitution that belongs to the *people*, not to the Supreme Court.

- 2) **Marriage Amendment (1998):** In the same case cited above (*Bess v. Ulmer*, 985 P.2d 979), the Supreme Court also arrogantly decided that it had the right to edit the text of an amendment that was lawfully placed on the ballot by the Legislature for the voters to consider (the court deleted the entire second sentence of the amendment). This was a clear-cut violation of the separation of powers. To see a damning critique of the *Bess v. Ulmer* decision, see the *Alaska Law Review* article written by former State Senator Dave Donley, former Alaska Attorney General Douglas Baily, and several other attorneys:

<http://scholarship.law.duke.edu/alr/vol19/iss2/2/>

Regarding the *Bess* decision, Donley, Bailey, *et al.*, state:

This is, to the best of the authors’ awareness, the only case in which an American court has ever altered the text of a legislatively proposed constitutional amendment and then placed it on the ballot. To take such a radical new step, and arrogate to itself such authority, the court would need a compelling justification. The justification actually offered in *Bess*, however, was far from sufficient.

- 3) **Coercing Conscientious Objectors to Support Abortion:** In yet another astonishing case of judicial overreach, Dana Fabe as a Superior Court judge forced a private, non-profit, cooperative hospital to allow abortions to be performed in its facility – even though the member-elected Board of Directors had elected not to do so (*Mat-Su Coalition for Choice v. Valley Hospital Association, Inc.* 3PA-92-01207 CI (1995)). In the extreme ideology of Dana Fabe, support for a woman’s “right to choose” means that everyone else loses their “freedom of choice.”

2000 – Superior Court Judge Peter Michalski (3rd Judicial District)

YES: 57%

NO: 43%

Notes: The typical retention percentage for 3rd District judges in 2000 was in the range of 65 to 69 percent. Judge Michalski’s poor performance resulted from a meagerly funded campaign by Alaskans for Judicial Reform to unseat him. Judge Michalski provoked outrage with his 1998 decision in the case of *Brause v. Bureau of Vital Statistics*, in which he ruled that the State of Alaska couldn’t deny marriage licenses to homosexual couples unless it could prove a “compelling state interest” for doing so. Judge Michalski’s ruling prompted the Legislature to pass, and the voters to approve, a constitutional amendment defining marriage as a union of one man and one woman (Alaska Constitution, Article I, Section 25).

2000 – Superior Court Judge Sen Tan (3rd Judicial District)

YES: 55%

NO: 45%

Notes: Alaskans for Judicial Reform also opposed Judge Tan. Tan struck down the Legislature's 1997 law that sought to require a parent's consent before an abortion could be performed on a minor (*Planned Parenthood v. State*, 3AN-97-6014 CI). Thanks to Judge Tan, a 13-year-old girl can receive an abortion in Alaska today, without a parent's consent being required – even though it would be required for any other surgical procedure, or even for something as minor as an ear piercing.

Judge Tan also forced the Legislature to pay for abortions, even though the Legislature had voted to end funding of abortions through the state's General Relief Medical program (*Planned Parenthood v. Perdue*, 3AN 98-7004 CI). Judge Tan ruled that if the state chooses to pay for prenatal care for poor women and their unborn babies, then it must also pay for poor women to have abortions. In the lethal logic of Judge Sen Tan, if you're using public funds to help ensure that healthy babies are born, then you must also use public funds to ensure that some children are *never* born. Judge Tan's decision contradicted previous U.S. Supreme Court rulings, which said there is no federal constitutional right for a "free" abortion.

2000 – Superior Court Judge Mary Greene (4th Judicial District)

YES: 53%

NO: 47%

Notes: Judge Greene ruled that the University of Alaska had a legal duty to give the boyfriends and girlfriends of University employees the same benefits (e.g., coverage under health care plans, retirement, etc.) to which the *married* spouses of University employees were entitled (*Tumeo v. University of Alaska*, 4FA-94-43 CI).

2010 – Supreme Court Justice Dana Fabe

YES: 54%

NO: 46%

Notes: The lowest "yes" vote on a Supreme Court justice standing for retention in 30 years.

2012 – Superior Court Judge Sen Tan (3rd Judicial District)

YES: 55%

NO: 45%

Judicial Council's Influence on Election Results

In all of the retention elections cited above, the Alaska Judicial Council recommended a "yes" vote to retain a judge or justice who was embroiled in controversy based on the substance of his or her decisions. If there had not been a recommendation in each of these retention campaigns, the judge or justice in question would not have benefitted from the things that come attached to an AJC recommendation – such as state-sponsored campaign advertising and favorable media coverage. These differences could have produced a different outcome in each of these retention elections.

As evidence of this point, in one of the rare cases where the Alaska Judicial Council actually recommended a "no" vote on a judge, the results were almost a mirror opposite of the numbers above:

2010 – District Court Judge Richard Postma (3rd Judicial District)

YES: 46%
NO: 54%

###

**STATEMENT
of
Robert B. Flint**

**Before the House Judiciary Committee on
HB200
An Act relating to the Alaska Judicial Council
and to judicial retention elections**

April 10, 2013

My name is Robert Flint. I am an attorney who practiced law in Alaska for 47 years before retiring in 2010. I testify today in favor of HB200 which would remove the Judicial Council and one-sided public funding from judicial retention elections.

In 1955 the Alaska Constitutional Convention adopted the Missouri Plan for the selection of Alaska judges. The Missouri Plan shifts the power of selection from the public or publically elected officials, to a panel, a majority of whom are lawyers whom the public does not control.

The reason for the adoption of a method which reduces the public to a minority and gives power to an unelected majority is clear from reading the Convention proceedings. The Chairman of the Judiciary Committee, Delegate George McLaughlin, himself an elected judge, was determined to keep politics out of judicial selection. "What we are trying to prevent," he said, "are some of the travesties which have existed in some of the states where our judges are picked and plucked directly from the ward political office." There are few, if any, today who would disagree and wish to return to a partisan selection process, either specific or covert. Yet, I believe the result of the Missouri Plan was to dangerously overcompensate by largely removing the public from the control of their own government. We are a democracy, and the Missouri Plan is not democratic.

Nevertheless, the one check on the judiciary left to the public is the retention election. "The popular will should be exercised even in the control of the judiciary," McLaughlin said, "but the way to control it is to put the judge on a nonpartisan ballot."

An election involves a campaign. A campaign is over issues. The public takes sides on issues. That's what elections are for, including judicial retention elections. The Constitution, in creating the right of the people to campaign and vote for or against judges, grants no authority to the Judicial Council to intervene in that election. I have little doubt that, having done its best to eliminate political money and influence from the judicial selection and retention process, it would have wished it to return in the form of government funding and campaigning on one side of a retention election. You have a legal opinion with the obvious conclusion that such campaigning is clearly not authorized by the Constitution.

No statutory authorization existed before 1975 when a statute was enacted at the request of the Judicial Council allowing the publicizing of Council recommendations. Given the evident desire of the Council to take sides in retention elections, it is wise to return to original status where the Council did not intervene. Unlike the recent active interventions by the Council, its original status resulted in no known problems and certainly no mischief.

Judges who have been opposed in the past have not been left bare of support in an election, financial or otherwise. A "Friends of Judge Blank" group is easy to form and not difficult to raise money for considering that attorneys and other interest groups who support the direction that the judiciary has taken are not poor. To substitute a government funded and run campaign for or against an incumbent judge is one big actual step to making sure the popular will, as Delegate McLaughlin puts it, has lost even this small way to govern itself.

It should be noted that the Judicial Council reviews the performance of judges on legal ethics, courtesy and similar matters, but not on judicial philosophy and separation of powers issues. It is on the latter issues, not the former, that retention elections are contested. Even by its own Charter, the Judicial Council should stay out of influencing an election contested on such issues. The way to ensure that a future Judicial Council won't make the same mistake the current Council did is to enact this bill.

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Research Brief

TO: Representative Max Gruenberg
FROM: Chuck Burnham, Legislative Analyst
DATE: November 6, 2012
RE: Legislative Attempts to Defund or Disempower the Alaska Judicial Council
LRS Report 13.081

You asked if legislators have attempted to defund or disempower the Alaska Judicial Council. You were particularly interested in such attempts made through sub-committees of the House Finance Committee.

As you know, the Alaska Judicial Council (AJC) is an independent citizens' commission created by Article IV, Section 8, of the Alaska Constitution.¹ Six members of the Council serve staggered, six-year terms and are comprised of three attorneys selected by the Alaska Bar Association and three non-attorneys appointed by the governor and approved by the legislature. The Chief Justice of the Alaska Supreme Court serves as the seventh member and chair of the AJC. The group serves two primary functions: screening applicants for judicial vacancies and forwarding the names of the most qualified individuals to the governor for selection; and evaluating the performance of sitting judges and recommending to voters whether they should be retained.² This system of appointment and retention—commonly known as the “Missouri Plan”—was crafted by delegates to the Alaska Constitutional Convention after significant deliberation and debate in order to avoid the politicization of the judiciary that was expected to occur should judges be subject to election by popular vote.³

Because the AJC recommends judges for appointment and retention, its decisions periodically come into question when a given judge's decision in a case is unpopular with a portion of the population. On a few occasions, despite the AJC's constitutional authority, this criticism has gone beyond the general public as a number of governors and legislators have challenged the role of the Council and sought to weaken it through executive action or by cutting its budget.

In 1993, Governor Hickel unsuccessfully requested that the council reconsider nine applicants passed over in favor of the four individuals it recommended to fill a vacancy. Although there was concern that a constitutional crisis would erupt over the executive's desire to appoint more politically conservative judges, the issue was settled when the governor chose from the AJC recommendations. The incident prompted the AJC to change its by-laws, adding a sentence reading “The Council will not reconsider the names submitted to the Governor after the nominees are submitted to the Governor.”⁴

In 1998, following court decisions striking down anti-abortion laws and another challenging a gay-marriage ban, a number of conservative legislators sought constitutional amendments through HJR 47 and SJR 34 to make appellate judges and all members of the Judicial Council subject to legislative approval.⁵ Neither measure received a floor vote. In following years, however, conservatives were encouraged by strong majorities in the legislature and the 2002 election of a governor who mentioned reform of the Council during his campaign to again attempt changes to the AJC.

In August 2004, Governor Murkowski responded to recommendations from the Council with a letter stating, “After careful consideration I have decided to reject the three candidates you have proposed.” This response—the first outright rejection by

¹ Three other sections of Article IV detail aspects of the Council: Section 9 directs the Council to conduct studies and make recommendations to the Legislature and Supreme Court for improving administration of justice; Section 13 requires that Council members, as well as justices and judges, be compensated “as prescribed by law”; and Section 16 delineates the nomination process and terms of service of the first Judicial Council. A catalog of all laws pertaining to the Council is available at <http://www.ajc.state.ak.us/about/aklaw.html>.

² More information on the AJC is available on the Commission's website at <http://www.ajc.state.ak.us/index.html>.

³ Constitutional Convention minutes on this topic are available online at <http://www.ajc.state.ak.us/about/convmin.html>.

⁴ Sheila Toomey, “It's Official: No Substitutions on Judicial Menu: By-Law Changes Says Governor Can't Ask for More 'Qualified Nominees' for Judgeships,” *Anchorage Daily News*, November 4, 1993, p. E1.

⁵ Text of the measures, which are identical, is available at http://www.legis.state.ak.us/basis/get_bill.asp?bill=HJR%2047&session=20.

a governor of AJC recommendations and an apparent violation of the state constitution—brought swift criticism, the seeking of an injunction on the governor from the legislature, and a lawsuit from the Alaska Public Interest Research Group, but approval from conservative critics of the state’s judiciary and the Council. Governor Murkowski stated that nothing barred the Council from sending him an expanded list of nominees and in fact the AJC should forward all qualified nominees rather than the select few it deemed most qualified.⁶ Ultimately the governor relented, selecting a nominee from the Council’s recommendations; however, the incident increased resentment of the Council’s protected status, stoking interest among conservatives in changing the appointment process, and prompting a joint meeting of House and Senate Judiciary Committees in September 2004.⁷

Following Governor Murkowski’s election, the budget of the AJC began coming under pressure. In fiscal year (FY) 2003, the Council was allocated roughly \$839,000; by FY 2005, that figured had dropped to about \$753,000. During the budget process for FY 2006, which occurred a few months following the Governor’s conflict with the AJC, the House Finance Sub-Committee with oversight of the Council’s budget recommended a net decrease of \$83,000 from the previous year’s budget, indicating that two of the AJC’s seven staff positions were unnecessary.⁸ Around the same time, Finance Chair Rep. Mike Chenault suggested that the Council was overstaffed compared with similar organizations in other states, and proposed cutting six positions and \$318,200.⁹ Ultimately, the legislature approved a budget of approximately \$705,000 for FY2006. In subsequent years the Council’s budget has steadily increased, reaching roughly \$1.1 million in FY 2013.

We hope this is helpful. If you have questions or need additional information, please let us know.

⁶ Sheila Toomey, “Rejection of Judge List is ‘No Crisis’—Murkowski Aide: The Governor Wants to Change the Judiciary Selection Process,” *Anchorage Daily News*, September 3, 2004, p. B1.

⁷ Minutes from that meeting can be accessed at <http://www.legis.state.ak.us/pdf/23/M/HJUD2004-09-300912.PDF>.

⁸ As you may know, subcommittee meetings are not typically recorded as a matter of course and minutes are not systematically kept or published. As a result, it is impossible to know the extent to which cuts to the AJC budget have been introduced or discussed in those bodies over the years. The information we cite in this report is taken from news media and budget documents.

⁹ We include two *Anchorage Daily News* articles on this topic as Attachment A.

Attachment A

Sean Cockerham, "Lawmakers Seek to Ax Judicial Council Budget—Tensions: Agency would be Out \$318,200 and Six Staff Positions," *Anchorage Daily News*, March 4, 2005, p. B1

Matt Voltz, "House Panel Recommends Judicial Council Cuts—Budget: Subcommittee Advises \$83,000 Reduction," *Anchorage Daily News*, March 8, 2005, p. B7



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Lawmakers seek to ax judicial council budget - TENSIONS: Agency would be out \$318,200 and six staff positions.

Anchorage Daily News (AK) - Friday, March 4, 2005
Author: SEAN COCKERHAM Anchorage Daily News ; Staff

The Alaska Judicial Council faces a massive budget cut from the Legislature just months after it battled with Gov. Frank Murkowski over an Anchorage judgeship.

Kenai Republican Rep. Mike Chenault, in charge of the court system budget, said the judicial agency is overstaffed. He has proposed to cut its budget almost in half and drop six staff positions. That would leave the council, whose duties include screening applicants for state judgeships, with just an executive director and secretary.

Larry Cohn, the executive director, said the council would be able to do "practically none" of its work without the staff.

"It would reduce the quality of our judiciary," he said.

The council, in addition to interviewing and screening applicants for judgeships, evaluates judges and gives recommendations to the public on whether they should keep their jobs. It also conducts studies on justice issues in Alaska. One, for example, explored the fairness of felony prosecutions.

The staff provides support for the council's volunteer public members.

Democrats in the Legislature claimed the cut was at least partly political revenge after the council's fight with the governor last fall. Murkowski balked at filling a vacant Anchorage judgeship from a list of three nominees forwarded by the council. Murkowski said he wanted to be able to choose from all qualified applicants and not just the short list provided by the council.

The Alaska Constitution tells the independent council to review the judge applicants and forward two or more names to the governor. The framers said they wanted to make the selection of judges as nonpolitical as possible.

Murkowski ended up appointing a judge nominated by the council but not before a political uproar.

There's often tension between the Republican-controlled Legislature and judges -- over abortion, for example.

"Punishing the judicial council because they don't like what the judicial council does is, in my mind, an abuse of the budget process," said Rep. Ethan Berkowitz, D-Anchorage.

But Chenault, chairman of the House court budget subcommittee, said it has nothing to do with punishment.

"The issue is that, in our minds, they can't justify the amount of employees for the amount of work that they have," the Kenai Republican said.

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He said the council has done just seven research reports in the past five years. Now that much of its work can be done over the Internet, the council ought to be more efficient, he said.

Cohn, the council's executive director, disagreed with Chenault's criticism.

"I think it reflects a real misunderstanding of what the **judicial council** does and why it is we do it," he said.

Cohn said the reports, requested by the courts, the Legislature or the governor, are based on original research and can be more than 400 pages long. He said the council's workload has gone up in recent years as the rate of vacancies in judgeships doubled.

He said the proposed cut from \$750,000 to \$431,800 blindsided him; the Legislature hadn't discussed it with the council, he said.

Chenault, the main House architect of the state operating budget, said his cut is far from final. The Legislature is going to talk about it, he said. He also said he supports the council's mission.

"It's simply a matter of making them accountable for the employees and the amount of money we spend ... in my position I'm charged with counting dollars," he said.

Anchorage Republican Rep. Lesil McGuire, the chair of the House Judiciary Committee, said she didn't know the details of the proposed cut. But she said it troubled her.

"Instinctively, I would tell you that is a dangerous move, considering all the (judicial) vacancies we've had and all those that are predicted," McGuire said.

Daily News reporter Sean Cockerham can be reached in Juneau at scockerham@adn.com

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House panel recommends Judicial Council cuts - BUDGET: Subcommittee advises \$83,000 reduction.

Anchorage Daily News (AK) - Tuesday, March 8, 2005

Author: MATT VOLZ *The Associated Press* ; WIRE

A House subcommittee has recommended cutting the budget of the Alaska **Judicial Council** by more than \$83,000, which would be the second consecutive year the council's budget has been reduced.

The council had requested an \$81,600 incremental increase of its \$753,200 budget for the next fiscal year. The House Finance subcommittee on Monday approved that increase, but then turned around and deleted \$165,300 from the council's budget.

The cuts are meant to delete two staff positions that should streamline the council, said House Finance Co-Chairman Mike Chenault, R-Nikiski.

"I don't believe there is any other council anywhere that has that amount of staff associated with it," Chenault said.

The council nominates people to fill judicial vacancies, evaluates judges' performances and researches ways to improve Alaska's justice system. The council has three members and a staff of seven.

The cuts would immediately affect the council's operations, said executive director Larry Cohn.

"It would have a significant impact on our ability to fulfill our constitutional and statutory responsibilities," Cohn said. "The timing of a cut like this is compounded by the fact that our workload has increased."

Chenault and fellow Republican Reps. John Harris of Valdez, Pete Kott and Nancy Dahlstrom, both from Eagle River, voted for the budget cut.

Democratic Reps. Sharon Cissna and Max Gruenberg, both from Anchorage, voted against it.

Chenault said the cut was not retribution for a dispute between Republican Gov. Frank Murkowski and the **Judicial Council** on filling a judicial vacancy.

Last September, Murkowski rejected the council's three recommendations to fill an Anchorage Superior Court judgeship, only to back down after a lawsuit was filed and Murkowski was accused of challenging the council's constitutional authority.

Chenault said he has had no communication with the governor's office about the council's budget.

"The retaliation issue is the issue that probably upsets me the most," he said.

Kott said he voted for the cut, but only to prevent holding up the budget process. He said he would like to see the council's budget restored to what it was.

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"I hope the **Judicial Council** comes forward and makes their case," Kott said.

Gruenberg said that the council does important work and that its studies are objective and scholarly.

"These are people who are totally independent; they have no ax to grind," he said.

The recommendation goes before the full House Finance Committee.

Last year, the Legislature cut \$50,000 from the council's budget and did not fund employee benefit increases of \$30,000, Cohn said.

Over the past three years, Cohn said, the number of judicial vacancies has doubled over the historical average. As the population grows and the judiciary continues to age, that trend is likely to continue, Cohn said.

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Testimony Re: HB 200

Michael Pauley, Alaska Family Action

Mr. Chairman, members of the committee, I'm Michael Pauley. I'm a lobbyist for Alaska Family Action, which is the legislative advocacy arm of the Alaska Family Council.

Our organization is primarily focused on family policy. Some of our key issues include promoting greater respect for human life; protecting the institution of marriage; defending freedom of religious expression; and supporting parental choice in education.

We're also one of the few organizations in Alaska that has taken an active role in judicial retention campaigns. And that is why I'm here today.

Our organization strongly supports HB 200. This bill would accomplish a very simple, but also a very important change: it would prohibit state government from using public funds to influence the outcome of any judicial retention election.

We believe this is a crucial step for preserving what was the original intent in our Constitution for having retention elections in the first place.

The retention election is the only opportunity for the public to directly engage in the process of determining who will serve them in the 3rd branch of government.

We believe the public has a right to evaluate judges without state government exercising an improper influence by "advising" the public on how they should cast their ballots.

Most Alaskans take it for granted that state funds could never be used legally to pay for campaign advocacy messages on behalf of a candidate for Governor, or a legislative candidate.

And yet when it comes to judicial retention elections, there is not even a pretense of neutrality regarding the outcome. The state government, through the Alaska Judicial Council and the Division of Elections, spends untold thousands of dollars in every election cycle to promote a specific vote on judges and justices who stand for retention.

This was not how things were done in the early years of statehood. From 1959 to 1975, state government respected the independence of voters. That all changed in 1975, when the Alaska Judicial Council asked for, and the Legislature granted, a new statutory authority for the Council to make vote recommendations.

The Alaska Constitution, at Article 9, Section 6, says that no public funds can be appropriated except for a public purpose. It is our view that there can be no valid public purpose for using the public's money to tell the public how they ought to vote. If that were indeed a valid public purpose, then perhaps we should establish a commission to

evaluate legislators, and the Governor, and even ballot propositions, and make similar vote recommendations.

The national context

I'd like to speak briefly to how the Alaska system compares to other states. In a nutshell, the Alaska process is highly unusual.

The majority of states do not have any government-funded evaluation program for judges. Of those that do, many of these states provide the evaluation information only to the judge, for purposes of self-improvement. In other states this information is provided to the Governor or Legislature, to help guide decision-making as to whether a particular judge should be reappointed.

According to the Institute for the Advancement of the American Legal System at the University of Denver (iaals.du.edu), there are only 6 states, other than Alaska, where a government-sponsored evaluation of judges is provided to voters:

Arizona
Colorado
Missouri
New Mexico
Tennessee
Utah

But even among this minority of states, there are important differences. In Arizona, the evaluation provided to voters does not include a vote "yes" or "no" recommendation.

Instead, the Arizona Commission on Judicial Performance Review (www.azjudges.info) simply tells voters whether they feel a judge/justice "meets judicial performance standards" or "does not meet judicial performance standards." Although we believe this still exerts an improper influence on elections, it at least shows more restraint than the practice we follow in Alaska.

There are also key differences in how retention recommendations are communicated to the public. The Alaska system involves an aggressive expenditure of public funds to send the "yes" or "no" vote recommendations to every registered voter by means of the Division of Elections voter pamphlet. In addition, the Alaska Judicial Council has routinely spent public funds on newspaper ads and radio ads and other media to advertise its vote recommendations.

Our research shows that only two other states – Colorado and Utah – actually provide an explicit "vote yes" or "vote no" recommendation which is then communicated to every voter in the state in an official voter pamphlet. The other states – such as Missouri and New Mexico – make the recommendations available in a more passive manner, by posting the information on a website.

The list of states providing voters with retention recommendations formerly included Kansas. However, in 2011, the Legislature eliminated all funding for the Kansas Commission on Judicial Performance. This was spurred in part by voter anger over the state using public funds to tell people how to vote.

The Alaska History

So how did we arrive at the system we have now in Alaska?

In 1975, according to a paper by the American Judicature Society, there was no state in the country that had what we have in Alaska today – a state-sponsored program of evaluating judges, including a retention recommendation, which was communicated to all voters, using public funds.

On April 2, 1975, the members of the Alaska Judicial Council met with the House Judiciary Committee. According to the meeting minutes, and I'm quoting here,

The Council does not have specific statutory authority to evaluate judges' qualifications and convey this information and recommendation to the public. They feel it is a legitimate function of the Council and would like specific authorization.

Five days after this meeting occurred, the Judiciary Committee filed HB 384, by request of the Judicial Council. This was the bill that creates the law we're living under now. The bill was referred to just one committee – Judiciary.

Three days later, Judiciary heard the bill, and moved it out of committee. 15 days later it was on the House calendar in 3rd reading and passed unanimously. The Senate received it the next day. Its first and only hearing occurred in the Senate Judiciary Committee 4 days later. And then, 3 days after that, the bill was on the Senate floor and passed unanimously.

The total elapsed time from the moment the bill was first introduced, to final passage by both houses of the Legislature, was an astonishing 26 days. Governor Jay Hammond signed it into law on May 23, 1975.

Given the speed at which this matter traveled through the Legislature, and the fact that we're talking about the pre-Internet age of 1975, it's reasonable to infer that there was very little public awareness of this bill. The first time that many in the public likely became aware of it was during the 1976 election, when they received their voter pamphlets and noticed for the first time that an agency of state government was advising them on how they should cast their ballots.

One of the reasons I'm glad that HB 200 has been introduced is that it gives the Legislature – and the public – an opportunity to give this issue the careful and deliberate consideration that it apparently did not receive back in 1975.

Frankly, if the Legislature sees fit to deliberate on this bill for slightly longer than 26 days, I'd say that's a good public process.

Public Perception of Judicial Retention Elections

I'd like to take a moment to talk about public perceptions of judicial retention campaigns, which appear to be changing. For much of recent history, judicial retention elections attracted little attention from the public, whether in Alaska or in other states. However, that is now changing.

According to a study by Oliver Roeder at the University of Texas at Austin, in the 2010 election cycle there were contested judicial retention elections in five states: Alaska, Colorado, Illinois, Iowa, and Kansas. The total amount of money spent in these retention campaigns was \$3 million.

The most noteworthy retention battle of the 2010 election cycle occurred in Iowa, where voters removed three Supreme Court justices from the bench. And I'll note in passing that Iowa is among the majority of states that does not advise voters on how they should cast their ballots.

In the 2012 election cycle, there were contested retention campaigns in Alaska, Colorado, Florida, and Iowa. And unfortunately, I don't have the campaign spending figures from that election cycle.

But clearly, the days when retention elections were seen as a rather boring ritual of democracy are over. Why is this?

I think U.S. Supreme Court Justice Antonin Scalia provided a good answer to that question. In his dissenting opinion in the case of *Planned Parenthood vs. Casey*, Justice Scalia stated as follows:

“The American people love democracy and the American people are not fools. As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers’ work up here – reading text and discerning our society’s traditional understanding of that text – the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. But if in reality our process of constitutional adjudication consists primarily of making *value judgments*; if we can ignore a long and clear tradition clarifying an ambiguous text, as we did, for example, five days ago in declaring unconstitutional invocations and benedictions at public high school graduation ceremonies, *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992); if, as I say, our pronouncement of constitutional law rests primarily on value judgments, then a free and intelligent people’s attitude towards us can be expected to be (*ought to be*) quite different. The people know that their value judgments are quite as good as those taught in any law

school – maybe better. If, indeed, the “liberties” protected by the Constitution are, as the Court says, undefined and unbounded, then the people *should* demonstrate, to protest that we do not implement *their* values instead of *ours*.

Mr. Chairman, I believe that at the end of the day, this is what retention elections are about. It’s an opportunity for the people to say to a specific judge or justice, or perhaps to the court system in general, “Our value judgments are every bit as good as yours – and we object to the fact that you’ve used the power of your office to impose *your* values, rather than *ours*.”

I believe the most important words in the Alaska Constitution are found in Article I, Section 2, which is titled: “Source of Government.” It states –

“All political power is inherent in the people. All government originates with the people, is founded upon their will only, and is instituted solely for the good of the people as a whole.”

Mr. Chairman, I believe that each retention election provides a free people the opportunity to assert that all government – including the judicial branch – is “founded upon their will only.” It is a vital component of our system of checks and balances. It helps ensure that the judicial branch will not abuse its power. It helps ensure that the courts will not make policy in areas that are rightfully the domain of the executive and legislative branches of government.

The people deserve to participate in retention elections as free agents, without the government exercising undue influence on their decisions.

That is what HB 200 will accomplish, and we urge the committee members to support this essential reform. Thank you for this opportunity to testify.

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HB 200 Testimony List

- Nancy Meade (Alaska Court System)
- Chief Justice Walter Carpeneti
- Larry Cohn (Executive Director, Alaska Judicial Council)
- Bill Gordon (Former Judicial Council member)
- Tina Williams (Former Judicial Council member)
- Bob Flynt (Alaska Family Council board member, retired attorney)
- Mike Pauley (Lobbyist, Alaska Family Action)
- Greg Schmidt (Alaska Family Council board member)

From: Lance Roberts [<mailto:roberts.lance@gmail.com>]

Sent: Wednesday, April 10, 2013 2:01 PM

To: Rep. Wes Keller; Rep. Bob Lynn; Rep. Neal Foster; Rep. Charisse Millett; Rep. Gabrielle LeDoux; Rep. Max Gruenberg; Rep. Lance Pruitt

Subject: HB200 Judicial Council Advertising

To the House Judiciary:

I hope you'll move House Bill 200 forward that would stop the Judicial Council from using public money to advertise to lobby the public. It's immoral for government to use public money to lobby the public for candidates or legislation, please help put a stop to that.

Lance Roberts
Fairbanks, AK