SJR

3

<TARGET><BILL>SJR 3</BILL><SUBJECT>SJR
3</SUBJECT><COMM>SSTA29</COMM></TARGET>

SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 1/21/15

FURTHER: Judiciary
Finance

Date of 5-Day Notice: 2/12/2015
(in accordance with Uniform Rule 23)

DATE TURNED
IN TO OFFICE: 3/24/15

State Affairs Committee considered SENATE JOINT RESOLUTION NO. 3

SJR 3 CONST. AM: MEMBERSHIP OF JUDICIAL COUNCIL

Proposing amendments to the Constitution of the State of Alaska to increase the number of members on the judicial council; relating to the initial terms of new members appointed to the judicial council; and relating to the confirmation of members of the judicial council.

and recommends:

[ ] be **replaced** with **CS** _____ (_____) *[ ] Same Title [ ] New Title*

[ ] adopt **previous CS** _____ (_____) *[ ] Same Title [ ] New Title*

[ ] attached amendment(s)

[ ] adopt _____ Letter of Intent

[ ] further referral to _____ Committee

Dept Abbr.	
ADM	LWF
CED	LAW
COR	LEG
CRT	MVA
EED	DNR
DEC	DPS
DFG	REV
GOV	DOT
DHS	UA

NEW FISCAL NOTE(S)				
Dept.	Fiscal	Indet.	Zero	FN #
GOV			✓	1
CRT	✓			2

PREVIOUS FISCAL NOTE(S)				
Dept.	Fiscal	Indet.	Zero	FN #

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	PRINTED LAST NAME	DO PASS	DO NOT PASS	NO REC	AMEND
	Huggins	✓			
	McGuire	✓			
	Wielechowski		✓		
CHAIR:	Stoltze	✓			

ALASKA STATE LEGISLATURE

SENATE STATE AFFAIRS COMMITTEE

Senator Bill Stoltze, Chair
State Capitol, Room 125
Juneau, AK 99801-1182
Phone (907) 465-4958
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Official Business

February 19, 2014
Bill Packet Information

SJR 3 CONST. AM: MEMBERSHIP OF JUDICIAL COUNCIL

- SJR3 ver A
- Sponsor Statement
- Sectional Analysis
- Fiscal Notes
  - JUD-AJC 2-13-15
  - OOG-DOE 2-13-15
- Supporting Documents
  - AJC Bylaws
  - CC Proceedings pp 683-696 Day 35
  - Excerpt from Victor Fischer's Book
  - Historical Roster of AJC Members
  - Judicial Selection Map
  - Stephen Ware White Paper
  - Citizen's Guide to the Constitution – Judicial Article IV

SJR 7 NATIVE AMERICAN VETERANS' MONUMENT

- SJR7 ver A
- Sponsor Statement
- Fiscal Note LEG-SESS 2-16-15
- Supporting Documents – Resolutions

Alaska State Legislature

Senator Pete Kelly

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Sponsor Statement – SJR 3

"Proposing amendments to the Constitution of the State of Alaska to increase the number of members on the judicial council; relating to the initial terms of new members appointed to the judicial council; and relating to the confirmation of members of the judicial council."

Senate Joint Resolution 3 places a constitutional amendment on the next general election ballot that would allow the voters to decide whether the membership of the Alaska Judicial Council should require legislative confirmation of all members, and be expanded to include three additional public (non-attorney) members.

SJR 3 would increase the public's voice on the Judicial Council through the addition of more members who are selected by democratically accountable officials, i.e., the Governor and the Legislature. In contrast, the attorney members are selected by the Board of Governors of the Bar Association, and are not currently subject to legislative confirmation, as they are in many other states. The lack of legislative confirmation is a stark glaring oversight when all members of every other Alaskan regulatory or quasi-judicial agency are subject to confirmation according to Article 3 Section 26 of the Alaska Constitution.

Expanding the council to six public members would allow for regional diversity on the council, which is called for in the Constitution. Historically, the three attorney members have come from four cities: Fairbanks, Anchorage, Juneau, and Ketchikan. While the three public members hail from more diverse locations, overall the majority are still from the same four cities. When the Constitution's framers created the Judicial Council, they could not have anticipated how much the state and regions would grow and change. Three public members and three attorney cannot adequately represent the diversity of a state with such complex regional and demographic differences. Considering the small number of attorneys residing in rural Alaska, offering three more public members is the surest way to see a more diverse body, and the ability to allocate representation to more than just traditional urban centers.

SJR 3 will correct a flaw that puts the Chief Justice in a perceived and sometimes actual conflict of interest. The Judicial Council must act by a concurrence of 4 members, as required by Article IV of the constitution. According to the Judicial Council Bylaws (Article V, Section 1), the Chief Justice normally does not vote on any matter coming before the council – except in those instances, quoting the Bylaws, *"when to do so could change the result."* Because of this

provision in the Council's bylaws, on those occasions when the six regular voting members split 3-3, the Chief Justice suddenly morphs from a non-voting member of the Council into the crucial deciding vote on whether an applicant will be forwarded to the Governor or not. Inevitably, this empowers the Chief Justice to use inclusion or exclusion of an applicant as a means of influencing who will be among his or her peers on the bench. It is even more alarming when this occurs during a Supreme Court nominating vote – and in fact, these tie-breaking votes actually occurred on *each* of the last two Supreme Court vacancies. The Chief Justice, like the rest of us, is only human – and should not be placed in a position where he or she can be accused of allowing personal biases and ideology to influence the decision regarding who sits next to them on the bench.

The tie votes on the Council are especially troubling when it involves a split of all three public (non-attorney) members voting one way, and all the attorney members voting the opposite way. Though rare over the course of the Council's history, these attorney / non-attorney vote splits have happened much more frequently in the past few years. From June 22, 2012 – Oct 10, 2013, there were five attorney / non-attorney split votes, in which all three public members voted to send an applicant's name to the Governor, but the Chief Justice sided with the attorney members and turned down the applicant. The addition of three more public members on the Council will create an odd number (9) of regular voting members instead of the current even number (6). This will make tie votes exceptionally rare – and in the unlikely event the Chief Justice must break a tie, they will always be on the side of some of the public members.

SJR 3 will expand the number of highly qualified Alaskans who are involved in vetting an ever-growing number of judicial applicants for a court system that is much larger than at the time of statehood, while retaining the professional insight attorney members bring to the council.

I urge your support for SJR 3 and the strengthening it would provide to the Judicial Council.

Alaska State Legislature

SENATOR PETE KELLY

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Sectional Analysis – SJR 3

"Proposing amendments to the Constitution of the State of Alaska to increase the number of members on the judicial council; relating to the initial terms of new members appointed to the judicial council; and relating to the confirmation of members of the judicial council."

Section 1: Expands the total number of Judicial Council members to ten. Three members will be appointed by the Alaska Bar Association and six non-attorney members will be appointed by the governor. All members are subject to legislative confirmation. The final member remains the chief justice of the Alaska Supreme Court who serves as the chairman and ex-officio member.

The judicial council shall act by a majority vote of a quorum of at least seven members.

Section 2: Allows for a transition to add the new members in staggered terms on the Judicial Council.

Section 3: Places the constitutional amendment before the voters during the next general election.

Senator.Pete.Kelly@akleg.gov

Fiscal Note

State of Alaska
2015 Legislative Session

Bill Version: SJR 3
Fiscal Note Number:
() Publish Date:

Identifier: SJR003-OOG-DOE-2-13-15
Title: CONST. AM: MEMBERSHIP OF JUDICIAL COUNCIL
Sponsor: KELLY
Requester: Senate State Affairs

Department: Office of the Governor
Appropriation: Elections
Allocation: Elections
OMB Component Number: 21

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2016 Appropriation Requested	Included in Governor's FY2016 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY 2016**	**FY 2016**	**FY 2017**	**FY 2018**	**FY 2019**	**FY 2020**	**FY 2021**
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**

Fund Source (Operating Only)

None							
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 (FY2015) cost: 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2016) cost: 0.0 *(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?

Why this fiscal note differs from previous version:

Not applicable, initial version.

Prepared By: Gail Fenumiai, Director — Phone: (907)465-2644
Division: Division of Elections — Date: 02/13/2015 11:47 AM
Approved By: Guy Bell, Administrative Director — Date: 02/13/15
Agency: Division of Administrative Services, Office of the Governor

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2015 LEGISLATIVE SESSION

BILL NO. SJR 3

Analysis

Passage of this resolution would require the constitutional amendment to appear on the 2016 general election ballot. The cost of providing information about the constitutional amendment in the Official Election Pamphlet, as required by AS 15.58, would be absorbed into the operating budget for the Division of Elections.

Fiscal Note

State of Alaska
2015 Legislative Session

Bill Version: SJR 3
Fiscal Note Number:
() Publish Date:

Identifier: SJR003-JUD-AJC-2-13-15
Title: CONST. AM: MEMBERSHIP OF JUDICIAL COUNCIL
Sponsor: KELLY
Requester: State Affairs

Department: Judiciary
Appropriation: Judicial Council
Allocation: Judicial Council
OMB Component Number: 771

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2016 Appropriation Requested	Included in Governor's FY2016 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY 2016**	**FY 2016**	**FY 2017**	**FY 2018**	**FY 2019**	**FY 2020**	**FY 2021**
Personal Services							
Travel			11.0	11.7	11.7	11.7	11.7
Services			2.5	1.0	1.0	1.0	1.0
Commodities			1.1				
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	**0.0**	**0.0**	**14.6**	**12.7**	**12.7**	**12.7**	**12.7**

Fund Source (Operating Only)

1004 Gen Fund			14.6	12.7	12.7	12.7	12.7
Total	**0.0**	**0.0**	**14.6**	**12.7**	**12.7**	**12.7**	**12.7**

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues							

Estimated SUPPLEMENTAL (FY2015) cost: 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2016) cost: 0.0 *(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? n/a

Why this fiscal note differs from previous version:

Initial version.

Prepared By: Jennie Marshall-Hoenack, Administrative Officer Phone: (907)279-2526
Division: Alaska Judicial Council Date: 02/13/2015 01:00 PM
Approved By: Susanne DiPietro, Executive Director Date: 02/13/15
Agency: Alaska Judicial Council

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2015 LEGISLATIVE SESSION

BILL NO. SJR003

Analysis

SJR3 proposes a constitutional amendment to increase the membership of the Alaska Judicial Council from seven to ten members. If SJR3 becomes law during this legislative session, the proposal to amend the constitution would be put to the voters on the November 2016 ballot. If the voters approve the amendment, the change would become law during FY2017.

The law would increase costs for AJC members to travel for meetings to nominate applicants for state judgeships. Travel costs would increase for two reasons: (1) a larger number of Council members will need to travel, and (2) the larger number of Council members would cause meetings to last longer, thus incurring additional meal and lodging expenses. The travel amount in this note is based on an historical average of our Council member meeting travel costs. The travel costs will be slightly lower in FY17 than in subsequent years because the new Council members would not be appointed until partway throught the 2017 fiscal year.

The three new Council members will need electronic devices for storing and viewing meeting materials. This commodity cost is a one-time expenditure. The Council will incur additional postage and other service expenses, including training expenses of approximately 1.5, to support the new members.

The impact of this change on staff time and conference room/meeting space is not able to be determined at this time.

Bylaws of the Alaska Judicial Council

Article I
Policies

Section 1. Concerning Selection of Justices, Judges, and Public Defender

The Judicial Council shall endeavor to nominate for judicial office and for public defender those judges and members of the bar who stand out as most qualified based upon the Council's consideration of their: professional competence, including written and oral communication skills; integrity; fairness; temperament; judgment, including common sense; legal and life experience; and demonstrated commitment to public and community service. The Council shall actively encourage qualified members of the bar to seek nomination to such offices, shall endeavor to prevent political considerations from outweighing fitness in the judicial and public defender nomination processes, and shall consistently strive to inform the public of Alaska's Judicial Council selection process.

Section 2. Concerning Retention of Judges

Pursuant to the provisions of Alaska Statutes Titles 15 and 22, the Council may recommend the retention in judicial office of incumbent justices and judges found to be qualified through appropriate means of judicial performance assessment; and may recommend against retention of justices and judges found to be not qualified through assessment processes. The Council shall endeavor to prevent political considerations from outweighing fitness in the judicial retention recommendation process.

Section 3. Concerning Administration of Justice

The Council shall initiate studies and investigations for the improvement of the administration of justice. These studies and investigations may be conducted by the entire Council, by any of its members or by its staff as directed by the Council. The Council may hire researchers and investigators and may contract for the performance of these functions. A topic for any study or investigation may be proposed at any meeting of the Council by any member without prior notice.

Article II
Membership

Section 1. Appointment; Limitation of Term

Members of the Council shall be appointed and shall serve their terms as provided by law; however, a member whose term has expired shall continue to serve until a successor has been appointed. Council members may be appointed to successive terms; however, no Council member should serve more than two full terms or one unexpired term and one full term.

Section 2. Effective Date of Appointment

(A) Non-Attorney Members. The effective date of a non-attorney member's appointment to the Council shall be the day following the effective date of the vacancy in the seat to which appointed, if appointed before that date; or the date of or specified in the gubernatorial letter of appointment, if appointed after that date. Non-attorney members shall have full voting rights effective upon the appointment date, unless and until denied confirmation by the legislature.

(B) Attorney Members. The effective date of an attorney member's appointment shall be the day following the effective date of the vacancy in the seat to which appointed, if appointed before that date; or the date of or specified in the letter of appointment from the board of governors of the Alaska Bar Association, if appointed after that date.

(C) Chief Justice. When the supreme court elects a new chief justice, the newly elected chief begins serving as a member and chair of the Council immediately upon assuming the office of chief justice.

Section 3. Oath of Office

The chair of the Council shall administer the oath of office to each new member, following a determination by the Council that the person selected has met the qualifications for membership as set forth by law.

Section 4. Vacancies

At least 90 days prior to the expiration of the term of any Council member, or as soon as practicable following the death, resignation, or announced intent to resign of any Council member, the executive director shall notify the appropriate appointing authority and request that the appointment process be initiated immediately to fill the vacancy.

Section 5. Disqualification

(A) Candidacy of Council Member. Any member of the Judicial Council who seeks appointment to a judicial office or the office of public defender must resign from the Council as of the date of the application and should not accept reappointment to the Council for a period of two years thereafter.

(B) Attendance at Regular Meetings. Council members shall attend all regular meetings of the Council unless excused by the chair for good cause. If a member is absent without good cause for two consecutive meetings, the chair shall formally request the resignation of that member.

Section 6. Expenses; Compensation

Council members shall be reimbursed for travel and other expenses incurred while on Council business and may receive compensation as otherwise provided by law.

Article III
Officers

Section 1. Officers Specified

(A) The officers of the Council shall be the chair, vice-chair and executive director.

(B) Chair. The Chief Justice of the Alaska Supreme Court is the chair of the Alaska Judicial Council.

(C) Vice-Chair. The vice-chair will be the member of the Judicial Council whose current term will first expire.

(D) Executive Director. The Council by concurrence of four or more of its members may designate an executive director to serve at the pleasure of the Council.

Section 2. Duties and Powers

(A) Chair. The chair shall preside at all meetings of the Council and perform such other duties as may be assigned by the Council. In the absence of an executive director or acting director, the chair will serve as acting director.

(B) Vice-Chair. The vice-chair shall preside at meetings of the Council in the absence of the chair. The vice-chair shall perform such other duties as usually pertain to the office of the chair when the chair is unavailable to perform such functions.

(C) Executive Director. The executive director shall keep a record of all meetings of the Council; shall serve as chief executive officer of the Council; shall be responsible to the Council for planning, supervising and coordinating all administrative, fiscal and programmatic activities of the Council; and shall perform such other duties as may be assigned. The executive director may receive compensation as prescribed by the Council and allowed by law.

(D) Acting Director. In the event of the incapacity, disability, termination or death of the executive director, the Council may appoint an acting director, and may impose such limits on the authority of said acting director as it deems advisable, until such time as a new executive director can be found, or until such time as the incapacity of the executive director can be cured. Should the Council choose not to appoint an acting director or otherwise fail to appoint, the chair of the Council will, ex officio, serve as acting director until a replacement can be found.

Article IV
Meetings

Section 1. Public Sessions; Public Notice

All meetings of the Judicial Council shall be open to the public, except as specifically provided. At least three days before any meeting to be held in Anchorage, Fairbanks, or Juneau, public notice of date, time, and place of the meeting and of general topics to be considered shall be

given through paid advertisements in major newspapers of general circulation in all three cities; for meetings to be held elsewhere in the state, paid public notice shall be provided at least three days in advance in the newspaper or newspapers of general circulation in such other areas as well as in the newspapers of general circulation in Anchorage, Fairbanks, and Juneau. Absent sufficient funding or when the notice requirements of this section are determined by the Council to be unreasonable, the Council is authorized to meet after such other period and utilizing such other form of public notice as it deems reasonable under the circumstances and which are consistent with the Council's legal obligations.

Section 2. Participation by Telecommunications

The Judicial Council shall meet in person when practicable. The Council may conduct a teleconference between regularly scheduled meetings with the consent of the chair. A teleconference conducted between regularly scheduled meetings is subject to the notice requirements in Article IV, Section 1 and Article IV, Section 8.

A member may participate telephonically in a regularly scheduled meeting only if the chair has found good cause to excuse the member from attending in person. A member may only participate telephonically if the member has had a substantially equal opportunity to evaluate all meeting materials, testimony, and other evidence related to the meeting.

Teleconferencing may be used to receive public input and to establish a quorum. At least one member or staff person must be present at the time and location publicly announced for any meeting or teleconference conducted by the Council.

Section 3. Regular Meetings

The Council shall hold two or more meetings per year, at times designated by the Council, to consider problems that may affect the Council and concern the administration of justice in the State of Alaska.

Section 4. Special Meetings

When a vacancy in the office of justice, judge, or public defender actually occurs or is otherwise determined to be impending, the chair shall call a special meeting of the Judicial Council within the time-frame required by law. The chair shall also call a special meeting of the Council upon the request of four or more members to consider business specified in the request; at that meeting, the Council may also consider other business that may come before the Council with the consent of four or more of the members present. The chair shall fix the time and place of such meeting not more than thirty days from the date of receipt of such request.

Section 5. Public Hearings

The Council may hold public hearings on all matters relating to the administration of justice as it deems appropriate and in such places as it determines advisable.

Section 6. Executive Sessions

The Council may decide as permitted by law whether its proceedings will be conducted in executive session. The Council may make this decision by concurrence of four or more members in a session open to the public. No subjects may be considered at the executive session except those mentioned in the motion calling for the executive session, unless auxiliary to the main question. The Council may not vote in an executive session.

Section 7. Place of Meeting

To the extent practicable, meetings should be held in the area of the State most directly affected by the subject matter under consideration.

Section 8. Notice of Meeting: Waiver

Notice of each meeting and teleconference shall be sent to all members of the Council as far in advance as practicable but in any event not less than five days before the date of the meeting or teleconference. Presence at a meeting or teleconference without objection shall constitute waiver of notice. When this notice requirement is determined by the chair to be unreasonable, the Council may meet on shorter notice.

Article V
Voting and Quorum

Section 1. Voting

All members of the Council present shall be entitled to vote on all matters coming before the Council, except as provided in Section 2 of this article and except that the chair shall only vote when to do so could change the result. The Council shall act by concurrence of four or more members. All votes shall be taken in public session. Any member can vote in the affirmative or negative or abstain on any matter. A member who wishes to abstain shall indicate the intention to do so prior to the question being called and shall disclose the reasons for the proposed abstention.

Section 2. Conflict of Interest; Disqualification

No member may vote on any matter in which he or she has a substantial personal or pecuniary interest. Any member who believes that his or her personal or business relationship to any applicant for a judicial or public defender vacancy or to any judge or justice being evaluated for retention purposes might prevent the member from fairly and objectively considering the qualifications of such person, or might otherwise involve a conflict of interest or create the appearance thereof, shall disclose the circumstances of the actual or apparent conflict to the Council

and shall disqualify himself or herself from discussing or voting on the nomination or retention of that person.

Section 3. Quorum

Four members of the Council shall constitute a quorum for the transaction of business at any meeting.

Section 4. Rules of Order

Robert's Rules of Order Revised will govern the meetings of the Council to the extent that they do not conflict with these bylaws.

Article VI
Committees

Section 1. Standing Committees

The Council may establish such standing committees from time to time when it finds them useful to conduct Council business. The chair may make standing committee assignments annually. The function of each committee shall be to monitor Council activities between meetings, to provide guidance and advice to staff, and to report to the Council at regularly scheduled meetings about the committees' areas of oversight. Each committee shall include at least one attorney and one non-attorney member. To the maximum extent possible, Council members should be permitted to serve on the committee or committees of their choice.

Section 2. Ad Hoc Committees

The chair may create ad hoc committees from time to time as needed. Ad hoc committees shall report to the Council on their activities and may make recommendations for Council action.

Article VII
Procedure for Submitting Judicial and Public Defender Nominations to the Governor

Section 1. Notice of Vacancy; Recruitment

Whenever a vacancy to be filled by appointment exists, or is about to occur, in any supreme court, court of appeals, superior court, or district court of this state, or in the office of public defender, the Council, by mail or by such other publication means as may be appropriate, shall notify all active members of the Alaska Bar Association of the vacancy, and shall invite applications from qualified judges or other members of the bar of this state for consideration by the Council for recommendation to the governor. Council members may also encourage persons believed by such members to possess the requisite qualifications for judicial or public defender office to submit their applications for consideration and may cooperate with judicial selection committees of the state or

local bar associations or of such other organizations as may be appropriate in the identification and recruitment of potential candidates.

Section 2. Application Procedure

Each applicant for a judicial or chief public defender position shall obtain and complete an application for appointment provided by the Council and shall comply with all the requirements therein. Such application may request such information as deemed appropriate to a determination of qualification for office, including but not limited to the following: family and marital history; bar and/or judicial discipline history; criminal record; involvement as a party in litigation; credit history; physical and mental condition and history; community activities; academic and employment history; military record; and representative clientele.

Section 3. Evaluation and Investigation of Applicants' Qualifications

(A) Judicial Qualifications Polls. The Judicial Council may conduct judicial qualifications polls in such form and manner as may be prescribed by the Council and cause the same to be circulated among the members of the Alaska Bar Association. The poll should be relevant to criteria listed in Article 1, Section 1 of these bylaws. If the Alaska Bar Association conducts a qualifications poll satisfactory to the Council, the Council may recognize such poll. The Judicial Council may conduct such other surveys and evaluations of candidates' qualifications as may be deemed appropriate.

(B) Investigation. The Council and its staff shall investigate the background, experience, and other qualifications of an applicant under consideration for a judicial or a public defender vacancy, and may call witnesses before it for such purposes.

(C) Candidate Interviews; Expenses. The Council may, when and where it deems desirable, conduct a personal interview with one, some, or all applicants for any judicial or public defender vacancy. Candidates requested to appear before the Council for such interviews shall appear in person; when, however, a candidate for good cause shown is unable to personally attend such interview, the Council may arrange for an interview by telephone or other electronic communication means with such applicant, and such alternative interview as may be appropriate, including but not limited to interview of such candidate by a committee of the Council at such other time and place as may be convenient. A candidate may choose to be interviewed publicly or in executive session, to protect the candidate's privacy interests consistent with Alaska's Open Meetings Act. The choice to interview publicly or in executive session will have no bearing on the Council's evaluation of the candidate's qualifications.

A candidate's expenses for judicial or public defender office are that candidate's responsibility. The Council may reimburse candidates for travel expenses in the Council's discretion. The cost of a telephone interview requested by the Council shall be paid by the Council.

Section 4. Nomination Procedure; Recommendation of Best Qualified Candidates

The Council shall select two or more candidates who stand out as the most qualified under the criteria set out in Article I, Section 1 of these bylaws, considering (a) other candidates who have applied; (b) the position applied for; and (c) the community in which the position is to be located. The names of the selected candidates shall be submitted to the governor in alphabetical order; but if the Council's vote does not result in selecting at least two applicants who are sufficiently qualified, the Council shall decline to submit any names and will re-advertise the position.

Section 5. Reconsideration

The Council will not reconsider the names submitted to the governor after the nominees are submitted unless the disability or death of one or more nominees leaves the governor with less than two names for filling a judicial vacancy. If the governor requests additional nominees in such a situation, the Council will submit additional names so that the governor has at least two nominees for each vacancy. The Council may select additional names from the original applicants for the position or may re-advertise for the position.

Section 6. Publication and Review of Procedures

The Council shall establish and follow written forms and procedures for the nomination of attorneys who apply to be justices, judges, and public defender. The Council shall publish the bylaws and procedures in its biennial report to the Alaska Supreme Court and legislature, post them on its website, and provide them to applicants. The Council shall review these procedures at intervals not to exceed three years.

Article VIII
Review of Judicial Performance

Section 1. Retention Election Evaluation

Prior to each general election in which one or more justices or judges has expressed the intention to be a candidate for retention election, the Council shall conduct evaluations of the qualifications and performance of such justices and judges and shall make the results of evaluations public. Evaluations may be based upon the results of a judicial performance survey conducted among all active members of the Alaska Bar Association and other members, retired or inactive, that the Council chooses. Evaluations also may be based upon such other surveys, interviews, or research into judicial performance as may be deemed appropriate, including but not limited to, any process that encourages expanded public participation and comment regarding candidate qualifications.

Section 2. Recommendation

Based upon the evaluative data, the Council may recommend that any justice or judge either be retained or not be retained. The Council may actively support the candidacy of every incumbent

judge recommended to be retained, and may actively oppose the candidacy of every incumbent judge whom it recommends not be retained. The Council shall publicize its recommendations.

Section 3. Judicial Performance Evaluation

The Council may conduct such additional evaluations of judges, other than at the time of retention elections, at such times and in such a manner as may be appropriate, and make the results of such additional evaluations public.

Section 4. Publication and Review of Procedures

The Council shall establish and follow written procedures for the evaluation of justices and judges. The Council shall publish the procedures in its biennial report to the Alaska Supreme Court and legislature, post them on its website, and provide them to justices and judges. The Council shall review these procedures at intervals not to exceed four years.

Article IX
Extra-Council Communications

Members of the public may wish to communicate their thoughts about the qualifications of applicants and the performance of judicial officers to individual Council members. All written communications between a Council member and any other person or organization regarding the qualifications of any applicant or the performance of any judicial officer should be forwarded to all other members; all oral communications regarding such matters should be shared with other members. Council members may encourage people to communicate with the Council in writing or at a public hearing.

Council members may discuss their individual views about the qualifications of applicants and the performance of judicial officers with members of the public, including the applicants and judicial officers. Council members may not publicly discuss the views of other Council members about the qualifications of applicants and the performance of judicial officers. Communications and deliberations among Council members that occur in executive session, including discussion about the qualifications of an applicant or the performance of a judicial officer shall be kept confidential in accordance with the law and Council bylaws.

Article X
Access to Council Records

Section 1. Public Records

All records of the Judicial Council, unless confidential or privileged, are public as provided in AS 40.25.110. The public shall have access to all public records in accordance with AS 40.25.120.

Public Records include:

1. Council bylaws and policy statements;
2. Minutes of Council meetings;
3. Final Council reports;
4. Financial accounts and transactions;
5. Library materials; and
6. All records other than those excepted in this bylaw.

Section 2. Right to Privacy

Materials that, if made public, would violate an individual's right to privacy under Art. I, Section 22 of the Alaska Constitution shall be confidential. Confidential materials are not open for public inspection and include:

1. Solicited communications relating to the qualifications of judicial or public defender vacancy applicants, or judicial officers;

2. Unsolicited communications relating to the qualifications of a judicial or public defender applicant or judicial officer, where the source requests confidentiality;

3. Those portions of the "application for judicial appointment" and "judge questionnaire" that reveal sensitive personal information entitled to protection under law;

4. Investigative research materials and internal communications that reveal sensitive personal information entitled to protection under law; and

5. Contents of Council employees' and members' personnel records, except that dates of employment, position titles, classification and salaries of present and/or past state employment for all employees are public information. In addition, application forms, resumes and other documents submitted to the Judicial Council in support of applications for any position with the Council grade 16 or above are public information.

Section 3. Deliberative Process

Materials that are part of the deliberative process of the Judicial Council, including those prepared by Council employees, are privileged and confidential if their disclosure would cause substantial and adverse effects to the Council that outweigh the need for access. These materials generally include drafts and computations prior to final document approval, internal memoranda conveying personal opinions, and other pre-decisional documents not incorporated into public records under this bylaw.

Section 4. Other Information

Information required or authorized to be kept confidential by law is not a public record.

Section 5. Privileged Communications

Communications that are legally privileged are not public information. These communications include but are not limited to communications between the Council and its attorney made for the purpose of facilitating the rendition of professional legal services to the Council.

Section 6. Release of Information

If a record contains both disclosable and nondisclosable information, the nondisclosable information will be deleted and the disclosable information will be disclosed. Information that otherwise would not be disclosable may be released to the subject of that information or to the public if it is in a form that protects the privacy rights of individuals and does not inhibit candid debate during the decision-making process.

Article XI
Office of Judicial Council

The Council shall designate an office of the Council in such location as it deems appropriate. Records and files of the Council's business shall be maintained by the Executive Director at this location.

Article XII
Appropriations

The Council will seek such appropriations of funds by the Alaska Legislature and other funding sources as it deems appropriate to carry out its constitutional and statutory functions.

Article XIII
Bylaw Review and Amendment

The Council shall review these bylaws at intervals not to exceed six years. These bylaws may be altered or amended by the Judicial Council by concurrence of four or more members, provided reasonable notice of proposed amendments has been provided to all Council members.

These bylaws adopted by the Alaska Judicial Council, this 15th day of February 1966; amended November 10, 1966; June 18, 1970; March 30, 1972; February 15, 1973; May 26, 1983; December 10, 1986; March 19, 1987; January 14, 1989; November 2, 1993; June 26, 1996; December 9, 1996; September 23-24, 1997; July 6-7, 1998; July 15, 2002; September 22, 2005; November 28, 2005; January 31, 2006; October 14, 2006; January 22, 2012; October 9, 2013.

ALASKA CONSTITUTIONAL CONVENTION

PART 1

Proceedings: November 8 -- December 12, 1955

Alaska Legislative Council

Box 2199 — Juneau, Alaska

by the people under their jurisdiction.

PRESIDENT EGAN: Mr. McLaughlin, you may ask a question.

MCLAUGHLIN: Merely to confirm Mr. Hinckel, he did discuss the matter with the Judiciary Committee, and we unanimously agreed that it would not change the deletion of the words, "of the state" on line 6, page 2, would not change the meaning and would effectuate the purpose that Mr. Hinckel sought. In other words, the Judiciary Committee unanimously consents.

PRESIDENT EGAN: Is there further objection to Mr. Hinckel's unanimous consent request? If not, the request has been adopted by the Convention, and the words "of the State" are ordered deleted. Mr. Sundborg.

SUNDBORG: Mr. President, I move and ask unanimous consent that we recess for ten minutes.

PRESIDENT EGAN: If there is no objection the Convention will stand at recess for ten minutes. The Convention is at recess.

RECESS

PRESIDENT EGAN: The Convention will come to order. The Chair has been informed that we have with us some of the members of the Board of Governors of the Alaska Bar Association. We have the President of the Alaska Bar, Mr. Mike Monagle of Juneau, and we are certainly happy to have you with us this morning. We are now on Section 8 of the Committee Proposal No. 2. Are there amendments to Section 8? If not, we will proceed to Section 9. Are there amendments to Section 9?

HURLEY: May I ask the Chairman of the Committee on Judiciary a question?

PRESIDENT EGAN: You may, Mr. Hurley, if there is no objection.

HURLEY: Is there in your opinion, Mr. Chairman, any possibility that the judicial council would nominate a large number of persons for selection by the governor? In other words, say ten, in which case it would, in effect, place the selection and the nomination on the governor and relieve the judicial council of any responsibility for having selected a precise panel. In other words, the fact that there is no upper limit there, would that affect the --

MCLAUGHLIN: The possibility does exist that the council could do that. Under the Missouri Plan, that is under the Missouri Constitution from which this section is derived, it reads "not less than three". It was the intent of the Judiciary Committee not to make it "not less than three" because then by law the council would be required to present three persons.

It is the desire of the Judiciary Committee (and to some extent that had confirmation of the Board of Governors of the Alaska Bar Association) that we keep the selections down to a minimum, because of the limited number of lawyers that we have in the Territory we wanted to restrict the selection of the governor. In fact, the fear has been expressed already that initially the governor might have too much determination in selecting the judges. For that reason it was kept down to two, but with the increase in size of the state it is well recognized that then the judicial council should have latitude in submitting more than two nominations for the one vacancy.

SUNDBORG: May I be permitted to address a question to Mr. McLaughlin?

PRESIDENT EGAN: You may, if there is no objection.

SUNDBORG: Mr. McLaughlin, several days ago when we were discussing this article for the first time, as I heard you, you answered a question, asked by someone, on whether if the governor did not like the names suggested to him he could call for more names, and my recollection was that you answered that in that case more names would be supplied. Was that a considered answer?

MCLAUGHLIN: That was not a considered answer. I believe that I corrected myself. Under this article, under Section 9, the governor has no right of refusal, he cannot refuse. The obvious answer to it, that's the way the section was intended, if there was any other intent it would mean, particularly with the present status of the Alaska Bar, that if the governor refused, he would very promptly exhaust all nominees and he would pick the man that he wanted.

SUNDBORG: Thank you, I just wanted to clear the record. May I address another question to Mr. McLaughlin?

PRESIDENT EGAN: If there is no objection.

SUNDBORG: Also with respect to Section 9, it does not mention there is an office of chief justice. Is there an office of chief justice created by this article? The reason I ask is that when a man, for instance, is appointed by the governor to the position of chief justice, does he hold that position subject to the elections every ten years, and the retirement provision is in here for life, or does each governor who is elected have the right to name a chief justice from among the panel that then makes up the supreme court?

MCLAUGHLIN: There is an office of the chief justice and once appointed by the governor, he remains the chief justice for life or until removed by the voters or until retired for other cause or resignation.

PRESIDENT EGAN: Mr. White?

WHITE: My question was somewhat along the same line, Mr. President. I am not sure that that answered it or not. Did I understand the intent of this section Mr. McLaughlin, to be that when the office of chief justice of the supreme court becomes vacant it, the new appointee is automatically the chief justice?

MCLAUGHLIN: Those who are designated by the judicial council, the nominees, the governor selects one of the two or maybe three nominees. The governor selects one of those and that man becomes the chief justice.

WHITE: Not only the first time but each subsequent time the office becomes vacant?

MCLAUGHLIN: That is correct.

PRESIDENT EGAN: Mr. Fischer.

V. FISCHER: Following through on the same line, if the governor desired to elevate one of the justices of the supreme court to be the chief justice, it would have to go through the regular procedure of approval by the judicial council that his name might be one of two submitted to the governor, and then it would be up to him to choose?

MCLAUGHLIN: That does not preclude a member of the supreme court from becoming chief justice. Actually, under this act he could resign. The judicial council could select him, he and someone else submitted to the governor and if the governor selected him, then he would become chief justice.

V. FISCHER: Would he have to resign?

MCLAUGHLIN: There is a possibility he would have to resign.

PRESIDENT EGAN: Are there any other questions or amendments relative to Section 9? If not, we will proceed with Section 10. Are there amendments to Section 10? Mr. Sundborg?

SUNDBORG: Mr. President, may I be permitted to address a question to Mr. McLaughlin? With respect to Section 10 I am in the dark as to what you mean by this phrase, "on the basis of appropriate area representation".

MCLAUGHLIN: The phrase, "on the basis of appropriate area representation" was put in there as a guide in order to assure that the judicial council would not consist entirely of three lawyers, let us say from an area like Anchorage. It was intended to have the representation from all areas of the Territory. We were indicating an intent to have a geographical

representation.

SUNDBORG: That then refers to and modifies the word, "appoint". They "appoint on the basis of appropriate area representation"?

MCLAUGHLIN: That is right.

V. RIVERS: Are members of the bar, all members of the bar, members of the "organized state bar", or is that just the American Bar Association?

MCLAUGHLIN: The "organized state bar" was a generic term the Committee took as best representing what would be a statewide organization of attorneys. Originally the Committee did have the expression "The Alaska Bar Association or its successor". The difficulty was that the legislature could terminate the organized bar, that is terminate the integrated bar, and we use the "organized bar" as best representing that association which would represent all the attorneys of the Territory.

V. RIVERS: "Organized state bar" would not necessarily imply that all members admitted to the bar then were members of that organized bar, is that right?

MCLAUGHLIN: That would imply this, that all could belong to it.

PRESIDENT EGAN: Mr. Hurley.

HURLEY: Mr. President, I would like to address a question to Mr. McLaughlin. My question really has reference to Section 11 but affects Section 10. In Section 11 you mention that "the chief justice shall thereafter be ex officio a seventh member and the chairman of the judicial council" and then mention that it requires an affirmative vote of four of its members. Does the term, "ex officio member", restrict his voting rights in that group?

MCLAUGHLIN: It does not restrict his voting rights at all.

HURLEY: In the matter of a tie he would have a vote?

MCLAUGHLIN: He does anyway.

PRESIDENT EGAN: Mr. Smith.

SMITH: I would like to address a question to Mr. McLaughlin. I am just a little curious as to the Committee reasons for providing that the organized state bar shall appoint the three attorney members and that the governor shall appoint the three nonattorney members.

MCLAUGHLIN: The reason, Mr. President, for that is that is the very essence of the so-called Missouri Plan. The three who are appointed by the bar represent a craft in substance, the theory being, and it has worked out in Missouri, that they best know their brothers, and they are there, based solely on their professional qualifications but selected because they would represent in theory the best thinking of the bar, and they are there solely because they represent their craft. In essence there is nothing undemocratic about it because of the fact that we know by its very nature that the judges of the supreme and superior court will be attorneys. The three lay members are in substance those who represent the public. Under the Missouri Plan there is a specific provision that the members appointed by the bar of Missouri shall be elected. They specifically use the word "elected". We didn't use it, we did not deem it necessary. Under the Missouri Plan the three laymen are appointed by the governor. There is a difference in this Section 9 in the sense that the laymen under our Section 9 are required to be approved by the senate. That is, they are subject to confirmation by the senate. The reason that varies from the Missouri Plan is that what happened was in Committee there was quite some discussion about the popular representation.

DAVIS: Mr. President, before he goes ahead, he is talking about Section 9, I am sure he meant Section 10. I would like it to be clear.

MCLAUGHLIN: Do you desire me to proceed, Mr. President, or wait until that arises.

PRESIDENT EGAN: It might be inasmuch as the question has arisen that if there is no objection, Mr. McLaughlin could proceed. Mr. Fischer?

V. FISCHER: I would like to give cause to the question to arise by introducing an amendment on this subject.

PRESIDENT EGAN: Mr. Fischer, you may introduce your amendment at this time. The Chief Clerk will read the proposed amendment.

CHIEF CLERK: "Section 10, page 3, line 22, strike the comma after the word 'article', substitute a period and strike the remainder of the sentence."

V. FISCHER: Mr. President, I move and ask unanimous consent for the adoption of this motion.

MCCUTCHEON: I object.

COGHILL: I second the motion.

PRESIDENT EGAN: Objection is heard. Mr. Coghill seconds the motion. The question is open for discussion. Mr. Fischer?

V. FISCHER: I would just like to briefly say that I believe the confirmation requirement is not necessary and is in a way

discriminatory against the lay members. I can see why it was put in originally, to give the legislature some say in the selection of judges. We have now amended Section 7 to provide that the qualifications, in effect, would be established by the legislature, and I believe that therefore we should not require confirmation of lay appointees to the council by the legislature.

PRESIDENT EGAN: Is there further discussion of the motion by Mr. Fischer? Mr. Taylor?

TAYLOR: Perhaps Mr. Fischer did not give full consideration to this particular section of the proposal. Under our present act, the Bar Association, the integrated bar, is an official body of the Territory. It is, you might say, chartered, by the legislature, and compulsory membership is required under the act. Nobody can practice law unless they have been admitted to the bar and belong to the integrated bar. Now the bar is screening their applicants, their men for the board, on this judicial board. They must have certain geographical representation in the integrated bar. We have three from the First Division, three from the Third Division and three from the combined Second and Fourth Divisions. So the selection of the three attorney members of the Commission are a selection by an official Alaska organization, the integrated bar. The other three would be selected and approved by the senate, appointed by the governor and approved by the senate. The attorney members have already been approved by the Alaska Bar Association, so why then put them through a further screening when they have already been screened by the members. The lay members have not been screened at all, only by the senate. We feel that the bar members are screened by the bar, then the lay members are screened by the senate. It makes it even.

PRESIDENT EGAN: Mr. Cooper.

COOPER: Mr. President, there is in Section 10, it is pertinent to this motion, the way that I interpret it, line 16, "the appropriate area", in line 20, "different major areas". I would like to ask Mr. McLaughlin if the intent was that the three attorney members of the judicial council would come from three appropriate areas and the three lay members would come from different major areas than that of the three appropriate areas?

MCLAUGHLIN: There is no difference. In fact, if the Committee on Style and Drafting desires in the future to change it, we would be delighted. The one reason why we have left in the words "major areas" on the laymen representation is the possibility (forgive me, Mr. Walsh) that Nome itself might have the feeling that it would be left out in its representation. If we struck "major areas" then there would be

an implication that we did not have to worry about certain areas of the Territory. Frankly, it is my belief that both could be made to conform and the same wording could be used.

COOPER: In other words then, the idea is not to cause the three laymen to come from different areas than the areas from which the three lawyers came?

MCLAUGHLIN: No, there was no such intent.

PRESIDENT EGAN: Mr. Londborg.

LONDBORG: I would like to ask the question of the Judicial Committee, if using the word major, does not that denote there is also a minor?

MCLAUGHLIN: In answer to that, Mr. Londborg, if the representatives from the alleged minor areas so desire, we can strike the whole expression, "major area or appropriate area" and then you're not assured of any representation at all. It is the desire of the Committee to have a general geographical representation on the judicial council and that includes all areas.

COGHILL: Point of order. I believe we are diverting from the subject before the Convention. We have a motion on confirmation by the senate for the nonattorney members. We are talking about representation from the major areas. I think we ought to dispose of the subject at hand.

PRESIDENT EGAN: You are correct, Mr. Coghill. That was allowed because the question was asked. The question is, "Shall Mr. Fischer's amendment, inserting a period and striking the words, 'subject to confirmation by the Senate', on line 22 of page 3, be adopted?" Mr. Davis?

DAVIS: Mr. President, was Mr. Fischer's motion seconded?

PRESIDENT EGAN: Yes, by Mr. Coghill. Mrs. Nordale?

NORDALE: I would like to call attention to the fact that one speaker said that the organized bar was an arm of the Territorial government and the senate was an arm of the Territorial government, and I would like to point out that the governor is certainly an arm of the Territorial government and elected by direct vote of the people.

HELLENTHAL: Mr. President, on Mrs. Nordale's suggestion I heartily agree. The people through their agency, the integrated bar, are going to screen the three attorney members. The people through their agent, the governor, will screen the nonattorney members. I don't know why we should get the senate in on the act in addition.

PRESIDENT EGAN: Does anyone else wish to speak on the subject?

UNIDENTIFIED DELEGATE: Question.

PRESIDENT EGAN: If not, the question is, "Shall Mr. Fischer's amendment be adopted?"

METCALF: Roll call.

PRESIDENT EGAN: Mr. Metcalf asks that the roll be called. The Chief Clerk will call the roll.

(The Chief Clerk called the roll with the following result:

Yeas: 26 - Armstrong, Boswell, Coghill, Collins, Cooper, Cross, Davis, V. Fischer, Hellenthal, Hilscher, Hurley, Kilcher, Knight, Lee, Marston, Nordale, Peratrovich, Poulsen, Reader, Riley, R. Rivers, Rosswog, Sundborg, Sweeney, VanderLeest, White.

Nays: 27 - Awes, Barr, Buckalew, Emberg, Gray, Harris, Hermann, Hinckel, Johnson, King, Laws, Londborg, McCutcheon, McLaughlin, McNealy, McNees, Metcalf, Nerland, Nolan, V. Rivers, Robertson, Smith, Stewart, Taylor, Walsh, Wien, Mr. President.

Absent: 2 - Doogan, H. Fischer.)

CHIEF CLERK: 26 yeas, 27 nays and 2 absent.

PRESIDENT EGAN: So the amendment has failed of adoption. Mr. Sundborg?

SUNDBORG: Mr. President, I have an amendment to offer.

PRESIDENT EGAN: Mr. Sundborg has an amendment to offer to Section 10. The Chief Clerk will please read the amendment.

CHIEF CLERK: "Section 10, line 22, strike the words 'the Senate' and insert in lieu thereof the following: 'a majority of the members of the Legislature in joint session assembled'."

SUNDBORG: Mr. President, I move and ask unanimous consent for the adoption of the amendment.

JOHNSON: I object.

MCNEES: I second the motion.

PRESIDENT EGAN: The question is open for discussion. Mr. Sundborg?

SUNDBORG: Mr. President, this is a fairly basic matter also which I am sure is going to come before us in some other connection before we are through here. The practice in the Territorial legislature in the past has been that confirmation of appointments is by both houses in joint session assembled. I believe it has been a good practice. I don't believe that only the senate should have the right to express the people's will with respect to appointments by the executive, as it would be in this case, but that it should be by majority of all the members of the legislature and not just by majority of the members of the upper house.

PRESIDENT EGAN: Mr. Hilscher.

HILSCHER: Mr. President, I wish to speak in favor of the amendment. The situation can arise, as it has in the past, where in the makeup of our senate alone, there might be a majority of attorneys as members of the senate or there may be a sufficient number of attorneys that if they wish to exert certain influence, they could act as somewhat of a damper on confirmation of the lay members of that board. I believe that Mr. Sundborg's amendment is worthy of support.

BARR: I am not going to discuss it very widely, but I would say that I don't know what may happen in the future. The only thing I can do is judge by what has happened in the past. I have never been in the senate when there was a majority of attorneys. But I remember distinctly when there was a time when there were 14 attorneys in the house out of 24.

UNIDENTIFIED DELEGATE: Question.

PRESIDENT EGAN: Mr. Ralph Rivers.

R. RIVERS: I am a little concerned. I think the confirmation of the lay members of the judicial council should be the same as the confirmation procedure which will be uniform throughout our governmental structure. Now I don't know what the body has in mind or whether the constitution could contain a blanket clause to the effect that when the language "subject to confirmation" is used that means subject to confirmation by the members of both houses sitting in joint session. It seems to me that Mr. Sundborg made a good point, but I don't know whether we are doing the right thing by saying "subject to confirmation by both houses sitting in joint session" and later on come up with a different motive for the general operation of the state. I would like to hear from somebody.

MCNEES: May I ask Mr. Rivers if this might not be a general policy of the Convention to require the meeting of both houses

in joint session on issues of this magnitude or nature.

R. RIVERS: That would be fine if that were to turn out to be the fact.

HERMANN: I think the adoption of any such provision should wait upon the report of the Apportionment Committee and find out how big the house and senate are going to be. You might very well have the tail wagging the dog in this case.

PRESIDENT EGAN: The question is, "Shall Mr. Sundborg's proposed amendment be adopted?" All those in favor of the adoption of Mr. Sundborg's amendment will signify by saying "aye", all opposed "no".

MCCUTCHEON: Call the roll.

PRESIDENT EGAN: The Chief Clerk will call the roll.

(The Chief Clerk called the roll with the following result:

Yeas: 28 - Armstrong, Buckalew, Collins, Cooper, Davis, Emberg, V. Fischer, Hellenthal, Hilscher, Hinckel, Hurley, Kilcher, Lee, McCutcheon, McNealy, McNees, Marston, Nordale, Peratrovich Poulsen, Reader, Riley, Smith, Stewart, Sundborg, VanderLeest, White, Mr. President.

Nays: 25 - Awes, Barr, Boswell, Coghill, Cross, Gray, Harris, Hermann, Johnson, King, Knight, Laws, Londborg, McLaughlin, Metcalf, Nerland, Nolan, R. Rivers, V. Rivers, Robertson, Rosswog, Sweeney, Taylor, Walsh, Wien.

Absent: 2 - Doogan, H. Fischer.)

CHIEF CLERK: 28 yeas, 25 nays and 2 absent.

PRESIDENT EGAN: The "yeas" have it and so the proposed amendment has been adopted. Are there other amendments to Section 10? If there are no further amendments, we will proceed --

STEWART: Mr. President, may we have that read as it was amende

CHIEF CLERK: "Line 22, page 3, strike the words 'The Senate' and insert in lieu thereof the following: 'a majority of the members of the Legislature in joint session assembled'."

PRESIDENT EGAN: Are there other amendments? We will proceed with Section 11. Mr. Coghill?

COGHILL: Mr. President, Section 10, I have an amendment that

I am contemplating on proposing. However, first I would like to hear discussion by the Convention as far as the subject of confirmation by the legislature in joint session assembled, as far as the attorney members of these boards are concerned. I feel that we are going to be setting up a precedent here that all professional boards will be chosen by their given profession and a minority will be picked by the nonprofessional group and confirmed by the elected members of the electorate for Alaska, but in turn the professions of the doctors, lawyers, and dentists and all the rest of them are going to have the chance to load the committee with professional people.

PRESIDENT EGAN: Mr. Coghill, the Chair has been lenient in allowing discussion even through there was no motion on the floor, owing to the fact that questions have been asked. The Chair will have to ask that these discussions be confined to matters before the Convention.

COGHILL: Well I'll submit a proposal then, Mr. Chairman.

CHIEF CLERK: "Line 18, page 3, after the word 'bar' insert a comma and add the following: 'subject to confirmation by the Legislature in joint session assembled'."

COGHILL: Mr. President, I move and ask unanimous consent for the adoption of this amendment.

BUCKALEW: Objection.

COGHILL: I so move.

KILCHER: I second the motion.

PRESIDENT EGAN: Mr. Kilcher seconded Mr. Coghill's motion. Will the Chief Clerk please read the proposed amendment again.

CHIEF CLERK: "In Section 10, line 18, after the word 'bar' insert 'subject to confirmation by the Legislature in joint session assembled'."

PRESIDENT EGAN: Add a comma.

SUNDBORG: I wonder if I might ask Mr. Coghill if he would consent to a proposed change in his amendment which would not change the sense but I believe would be a little smoother. If on line 22, after the word "article" we change the comma to a period and then insert "both the attorney and nonattorney members shall be". It would then read, the new sentence, would say "both the attorney and nonattorney members shall be subject to confirmation by majority."

COGHILL: Mr. President, I consent to that with consent of my second because it does not change the intent of my amendment.

PRESIDENT EGAN: Mr. Coghill, it might be more in order if you ask that your original amendment be withdrawn and then submit it. There will be no confusion in the minds of the delegates when we vote on it, if that is what you are attempting to accomplish.

COGHILL: Yes, that's right. I will so move and ask unanimous consent that my proposed amendment be withdrawn.

PRESIDENT EGAN: Mr. Coghill asks unanimous consent that his original proposed amendment be withdrawn. Is there objection? Mr. Riley?

RILEY: I object for purposes of comment. It would appear to me to be far more expeditious to act on it as first offered. Otherwise we are going to introduce the complication of, do we rescind our former action to put the show on the road. This could all be reconciled in Style and Drafting later if Mr. Coghill's motion is adopted.

SUNDBORG: I agree with that, Mr. President, and withdraw my suggestion.

PRESIDENT EGAN: Mr. Sundborg then asks unanimous consent that his motion be withdrawn. If there is no objection it is so ordered and we have Mr. Coghill's original motion before us. Mr. McLaughlin.

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

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

PRESIDENT EGAN: Mr. Ralph Rivers.

R. RIVERS: I want to heartily second the remarks of Mr. McLaughlin but also want to point out that the purpose of the draft as now written is to have a nonpartisan selection of these lawyer members, and the minute you adopt something like this, you are making a partisanship proposition out of it. We want that to carry through to a nonpartisan selection of judges, so I think our thinking is quite clear.

PRESIDENT EGAN: Mr. Coghill.

COGHILL: In bringing this up, I quite agree with both the Chairman of the Judiciary Committee and also the member. I believe that all of us here are working on committees real hard and we are trying to bring out good and concise thoughts. We are not trying to go to the extreme in our committee proposals, so that we will get a compromise on the floor. I don't think that is the intent. The purpose for this amendment is that I foresee that the nonattorney members of this board are going to be subject to all the ills of political skulduggery on the floor of the senate or the joint house assembled, and I see that if we are going to pick the judges on nonpartisan basis, that it should be left up to your representative of the government, the highest official in the executive branch which is your governor. That is the reason

why I voted for the amendment to strike that, the acceptance or confirmation by the senate. I think if we are going to accept some of them by the senate confirmation, we should accept them all. It is the precedent you are setting up here for boards on the professional level.

UNIDENTIFIED DELEGATE: Question.

PRESIDENT EGAN: The question is, "Shall Mr. Coghill's proposed amendment be adopted by the Convention?"

ROBERTSON: Roll call.

PRESIDENT EGAN: The Chief Clerk will call the roll.

(The Chief Clerk called the roll with the following result

Yeas: 4 - Coghill, Kilcher, Londborg, Mr. President.

Nays: 49 - Armstrong, Awes, Barr, Boswell, Buckalew, Collins, Cooper, Cross, Davis, Emberg, V. Fischer, Gray, Harris, Hellenthal, Hermann, Hilscher, Hinckel, Hurley, Johnson, King, Knight, Laws, Lee, McCutcheon, McLaughlin, McNealy, McNees, Marston, Metcalf, Nerland, Nolan, Nordale, Peratrovich, Poulsen, Reader, Riley, R. Rivers, V. Rivers, Robertson, Rosswog, Smith, Stewart, Sundborg, Sweeney, Taylor, VanderLeest, Walsh, White, Wien.

Absent: 2 - Doogan, H. Fischer.)

CHIEF CLERK: 4 yeas, 49 nays and 2 absent.

PRESIDENT EGAN: So the proposed amendment has failed. Are there other amendments to the section?

TAYLOR: I have one.

PRESIDENT EGAN: Mr. Taylor has a proposed amendment.

TAYLOR: Mr. President, I am proposing this amendment to Section 7.

PRESIDENT EGAN: Mr. Taylor offers a proposed amendment to Section 7. The Chief Clerk may read the proposed amendment.

CHIEF CLERK: "Line 2, page 3, after the word 'State' strike the balance of the section and insert 'for at least three years and have been residents of the State for at least three years next preceding their respective nominations; provided, that additional qualifications may be prescribed by law.'"

TAYLOR: I ask unanimous consent for the adoption of the amendment.

SUNDBORG: Objection.

TAYLOR: I so move.

METCALF: I second it.

PRESIDENT EGAN: Mr. Metcalf seconds the motion of Mr. Taylor. Mr. Taylor?

TAYLOR: I would like to mention one thing. The matter was brought up and we have argued this thing quite thoroughly. I felt that it might be of the period of time that would elapse. Now in the last three years we have admitted perhaps 50 attorneys to the practice of law in Alaska, and it seems like there are going to be quite a number of them admitted each year from now on. Now this past year we had 25 who took the examination, the year before 19, so those men who in the past couple of years have taken the bar and have been admitted to the bar, in all probability by the time we achieve statehood will have the required residence of three years, and they have been practicing law for three years, which will make them eligible for the bench. It seemed the opinion of some of the proponents to eliminate the five-year period. It was through the fact there might not be sufficient manpower, but I think that would be taken care of. Now, even putting the best light on it, we cannot anticipate we will have statehood for a year and a half or possibly more. I think I am being unduly optimistic when I say a year and a half. These men who are barred by time, that will be taken care of, as immaturity is always cured by the passage of time, and by three years we will have plenty of attorneys to pick for the judiciary. We feel there should be some restriction instead of dragging a man in from the outside and putting him on the bench, not knowing his qualifications or background, I think we should put at least three years because by that time there will be approximately 60 or 70 more lawyers in Alaska who will be judicial timber. I feel this amendment should be adopted.

PRESIDENT EGAN: Mr. McNees.

MCNEES: I rise to speak against the amendment on the same basis that I rose to speak against the original article as it was originally turned out in the Judiciary Committee. Feeling that it is not a matter of constitutional law but one of legislative law, therefore I oppose the amendment.

PRESIDENT EGAN: Mr. Gray.

GRAY: Will you have the Chief Clerk read the amendment again?

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VICTOR FISCHER
Institute of Social, Economic and Government Research
University of Alaska

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United States and residents of the state for at least three years . . . "[76] This recommendation also brought lively debate. Burke Riley of Juneau led the opposition, arguing that such a restriction could bar good men from public service in Alaska. Many Alaska-born delegates and long-time residents favored elimination of the residency requirements altogether. As M.R. Marston of Anchorage stated, the "sourdough" is a state of mind. He also said:

> . . . we hope to join the citizenry of the whole United States. We are a part of the whole, and I think it would show us to be very small and measly if we tried to give favors to one section of the North American continent. We are all one people . . .[77]

Whether the delegates shared these sentiments or not, they removed the three-year residence requirement by a vote of thirty-eight to sixteen,[78] leaving only the requirement of U.S. citizenship as a prerequisite for office.

The Executive Article

Highlights of the executive article as adopted include:

1. Vesting of complete executive power in the governor.
2. Independent election of the governor only, with a limit of two successive terms of four years.
3. A method of electing the secretary of state that ensures his being of the same political party as the governor. To further the idea that the secretary of state is "to bulwark the strong executive," he is not made the presiding officer of the Senate but given "such duties as may be prescribed by law and as may be delegated to him by the governor."
4. Provision for the governor to take office seven to eight weeks prior to the convening of the legislature in order to give him time beforehand to prepare a budget and get a start on his legislative program.
5. A broad grant of authority for the governor to enforce compliance with any constitutional or legislative mandate by any officer or agency of the state and its political subdivisions.
6. A streamlining of the organization of the executive branch, through provisions for:
   - Not more than twenty principal departments.
   - The head of each department to be a single executive unless otherwise provided by law.
   - Reorganization by executive order subject only to disapproval by the legislature within a prescribed period.
   - All department heads to be appointed by the governor subject to approval of the legislature in joint session; in cases where a board or commission is authorized by law to appoint its executive officer, the appointment is subject to the governor's approval.
7. Authorization for the governor to convene the legislature, jointly or either house separately.

In these and other provisions, the convention laid the groundwork for a strong executive branch.

[76] *Ibid.*, Appendix V, Committee Proposal No. 10, Section 16.
[77] *Ibid.*, p. 2242.
[78] *Ibid.*, p. 2244.

Judiciary Branch

The proposal dealing with the judiciary branch was the first to be considered by the convention. It emanated from a committee that was in general accord over the future state's judicial system. Consisting of five lawyers and two laymen, the committee quickly agreed to follow principles suggested by the American Bar Association and other professional civic groups. The main features of the proposed system were unity, simplicity, efficiency, accessibility, independence from the executive and legislative branches, and accountability to the people. The committee could start with an essentially clean slate—Alaska was then under the jurisdiction of federal courts, and these would fall away with statehood.

Members of the judiciary committee proposed a unified judicial system consisting of a supreme court, a superior court, and other courts established by the legislature. The entire court system was placed under the rule-making authority of the supreme court, with the chief justice named as the administrative head of all state courts. These provisions followed closely the example of the New Jersey constitution of 1947, which transformed one of the most cumbersome and costly state court systems into one recognized for its efficiency.

The judiciary article also embodied a nonpartisan plan for selecting judges based on the American Bar Association and Missouri Plan models. Under it, the governor appoints judges from nominees

presented to him by the judicial council, which is composed of three laymen appointed by the governor with the consent of the legislature; three attorneys named by the organized state bar; and the chief justice, who serves as chairman. Three years after his first appointment, a judge must submit his name to the voters of the state or of his district for approval or rejection. Once approved, a superior court judge goes before the voters for reconfirmation every seven years, and a supreme court justice stand for popular approval every ten years. The purpose of this provision is to make judges responsible to the people without subjecting them to partisan politics or competitive campaigns for election or re-election.

With respect to retirement of judges, attorney members of the committee R.E. Robertson of Juneau, seventy, and Warren Taylor of Fairbanks, sixty-four, strongly dissented from the proposal to set the retirement age for judges at seventy. They felt that ability to serve does not necessarily end at age seventy and that those reaching this age should "not be put in mothballs." A committee compromise was finally reached according to which judges would retire at age seventy but could be given special judicial assignments thereafter.[79]

Once the committee agreed on the proposed article, committee chairman McLaughlin sent letters to the presidents of the Alaska Bar Association and local bar associations, district judges, the U.S. attorney, and the U.S. Commissioner in Alaska, and to others in and out of the territory, asking for their comments on the draft. As a consequence, many endorsements of the proposal were obtained, including action by the board of governors of the Alaska Bar Association, which met in Fairbanks during the time the judiciary article was before the convention. The board agreed to support the article as recommended by the committee, and members of the board of governors appeared before the judiciary committee and spoke in behalf of the proposal with individual delegates.

The proposed judiciary article was considered in plenary session on December 9, one month and one day after the convention began. A number of amendments were considered in second reading, dealing with such issues as the responsibility for drawing judicial district boundaries, selection of the judicial council, and qualification of judges.

The committee proposal required supreme court and superior court judges to have been admitted to practice law in Alaska at least five years prior to their appointment and to have been residents of the state for the same period. In line with general opposition to

[79] *Anchorage Daily Times*, 6 December 1955.

excessive qualification requirements, the convention rejected both provisons. As finally passed, the article required only citizenship of the United States and Alaska and a license to practice law in the state. However, it also provided that the legislature could prescribe additional qualifications.

While the judiciary committee's residence requirements were defeated by convention delegates, its proposal that judges and justices be appointed by the governor upon nomination by the judicial council was upheld against those who favored an elected bench. The latter argued that the "appointment method will bring judges into politics more so than an election by the people."[80] The argument in favor of appointment was that judges chosen through elections would forever be looking over their shoulders to see if their decisions were popular. According to committee chairman George McLaughlin, all modern state constitutions and recent constitutional revisions provided for judicial appointment.[81] McLaughlin was reinforced by Fairbanks attorney Warren A. Taylor, who said that if the article were adopted, every university in the United States that has a law school and all law societies that have the opportunity of reading this article can honestly say that we have perhaps the most progressive and most modern and up-to-date system of selecting the judiciary of any state in the United States.[82]

Before the debate on this issue was over, nearly every attorney at the convention had spoken on this subject. In the end, only one other delegate, W.W. Laws of Nome, joined attorney Robert McNealy in opposing the selection process for judges; and the appointment process was sustained by a fifty-one to two vote.[83]

McNealy again opposed the proposed selection when the judiciary article was in third reading. He once more lashed out at what he believed to be a process potentially subject to much greater political interference and corruption, declaring that the election of judges was the one way to keep politics out of the judiciary. Though he won a few converts, his fight was futile, and the judiciary article met approval by a forty-seven to six vote.[84]

The approval of the judiciary article by the delegates was, however, not the last point at which basic questions were raised about its provisions. The convention consultants' memorandum reviewing the entire constitution pertained in part to the sections

[80] *Proceedings*, p. 583.
[81] *Ibid.*, pp. 583-87.
[82] *Ibid.*, p. 590.
[83] *Ibid.*, p. 610.
[84] *Ibid.*, pp. 2881-5.

that laid the basis for a strong and independent judiciary.[85] While they concurred with the basic objectives, the consultants stated that:

> These sections in particular, however, go a long way toward withdrawing the judicial branch from the control of the people of this state and placing it under that of the organized bar. No state constitution has ever gone this far in placing one of the three coordinate branches of the government beyond the reach of democratic controls. We feel that in its desire to preserve the integrity of the courts, the convention has gone farther than is necessary or safe in putting them in the hands of a private professional group, however, public-spirited its members may be.

The consultants then suggested a number of revisions that would, in their view, democratize the proposed system by providing for legislative confirmation of attorney members of the judicial council, adding a superior court judge and another lay member to the membership of the council, and other changes. However, the suggestions were not accepted by the meeting of committee chairmen and never reached the convention floor.

Local Government[86]

In providing for the legislative, executive, and judicial branches of government, delegates dealt with subject matter with which they were familiar and on which they had definite opinions. On the other hand, local government was a subject for which there was little Alaska experience to provide a useful point of departure and which provided few useful models. The local government committee, therefore, determined early that innovation was the key to structuring a local government system for Alaska.

Under territorial status, local institutions had undergone only limited development; there was little self-determination at the territorial and even less at the local level. Federal law prescribed the powers of the territorial legislature, severely limiting the scope and types of local government and restricting the powers that could be exercised by cities. For example, counties could not be established, bonding criteria were strictly delimited, and home rule could not be extended to cities.

A New Local Government System

Study of the PAS staff paper[87] and a review of local government experiences throughout the United States, Canada, Scandinavia, Latin America, and other parts of the world convinced committee members that they could look outside Alaska primarily for the purpose of evaluating basic principles and determining what *not* to do. They quickly saw that modern times and Alaska's unique geographic characteristics demanded a totally new and different system from any existing elsewhere. Delegates did not want to saddle Alaska with the conventional jumble of local government jurisdictions, particularly the proliferating special districts and archaic counties. Only an infinitesimal part of Alaska's 586,400 square miles was organized (about thirty cities and fifteen special districts); the bulk of the territory had no local government whatsoever. Thus, delegates faced a situation which invited, almost demanded, innovation. Accordingly, the convention's local government committee, aided by several consultants, proceeded to design a local government system adapted to Alaska and the times.[88]

Since there were no direct precedents, the committee decided that the local government article should consist of general statements and policy, rather than detailed prescriptions and criteria. The first draft article presented to the convention stated the general purpose was to provide a maximum of self-government to people in all parts of Alaska. To meet this goal, two basic local government units were established—boroughs and cities. This framework was designed to accomodate today's needs and tomorrow's growth and development.[89] The committee then set forth the principles underlying the proposed local government system:

1. **Self-Government.** The proposed article bridges the gap now existing in many parts of Alaska. It opens the way to democratic self-government for people now ruled directly from the capital of the territory or even Washington, D.C. The proposed article allows some degree of self-determination in local affairs whether in urban or sparsely populated areas. The highest form of self-government is exercised under home rule charters which cities and first class boroughs could secure.

[85] See Chapter 3, pg. 42.

[86] For more information on this topic, see the author's chapter "The Constitution Framework" in Thomas A. Morehouse and Victor Fischer, *Borough Government in Alaska*, pp. 33-65.

[87] Public Administration Service, *Constitutional Studies*, Chapter VIII.

[88] Principal consultants were Weldon Cooper and John Bebout. Primary references included the PAS staff study and George W. Rogers' *A Handbook on Alaska Regionalism*, Office of the Governor, Juneau, Alaska, November 21, 1955 (mimeo). The seven members brought to the committee a variety of backgrounds and experiences: large-city and small-town mayors, city councilmen, municipal utility board membership, secretary of League of Alaska Cities; they included businessmen, a civil engineer, a professional city planner, a commercial fisherman, a bush pilot, and a minister. Significantly, there were no attorneys and no member represented the special interests of education.

[89] *Proceedings*, Appendix V, p. 47.

Historical Roster of Alaska Judicial Council Members			
	Residence	**Appointment Effective**	**Expiration of Term**
Chairperson[1]			
Chief Justice Buell A. Nesbett	Anchorage	11/29/59	06/18/70
Chief Justice George F. Boney	Anchorage	06/18/70	11/16/72
Chief Justice Jay A. Rabinowitz	Fairbanks	11/16/72	11/16/75
Chief Justice Robert Boochever	Juneau	11/16/75	11/16/78
Chief Justice Jay A. Rabinowitz	Fairbanks	11/16/78	11/16/81
Chief Justice Edmond W. Burke	Anchorage	11/16/81	09/30/84
Chief Justice Jay A. Rabinowitz	Fairbanks	10/01/84	09/30/87
Chief Justice Warren W. Matthews	Anchorage	10/01/87	09/30/90
Chief Justice Jay A. Rabinowitz[3]	Fairbanks	10/01/90	09/30/92
Chief Justice Daniel A. Moore, Jr.	Anchorage	10/01/92	09/30/95
Chief Justice Allen T. Compton[3]	Anchorage	10/01/95	07/01/97
Chief Justice Warren W. Matthews	Anchorage	07/02/97	06/30/00
Chief Justice Dana Fabe	Anchorage	07/01/00	06/30/03
Chief Justice Alexander O. Bryner	Anchorage	07/01/03	06/30/06
Chief Justice Dana Fabe	Anchorage	07/01/06	06/30/09
Chief Justice Walter L. Carpeneti	Juneau	07/01/09	06/30/12
Chief Justice Dana Fabe	**Anchorage**	**07/01/12**	**06/30/15**
Attorney Members			
E.E. Bailey[2]	Ketchikan	02/24/59	02/24/62
E.E. Bailey	Ketchikan	02/24/62	02/24/68
Frank M. Doogan[3]	Juneau	10/15/68	04/73
Michael L. Holmes[4]	Juneau	05/73	02/24/74
Michael L. Holmes	Juneau	02/24/74	02/24/80
Walter L. Carpeneti[5]	Juneau	02/24/80	02/81
James B. Bradley[4]	Juneau	04/81	02/24/86
William T. Council	Juneau	02/24/86	02/24/92
Thomas G. Nave	Juneau	02/24/92	02/23/98
Geoffrey G. Currall	Ketchikan	02/24/98	02/23/04
Douglas Baily[3]	Juneau	04/27/04	07/18/07
Louis James Menendez[4]	Juneau	07/19/07	02/23/10
Julie Willoughby	**Juneau**	**04/27/10**	**02/23/16**
Robert A. Parrish[2]	Fairbanks	02/24/59	02/24/64
William V. Boggess[5]	Fairbanks	02/24/64	04/64
Michael Stepovich[4]	Fairbanks	05/64	02/24/70
Michael Stepovich	Fairbanks	02/24/70	02/24/76
Michael Stepovich[3]	Fairbanks	02/24/76	08/78
Marcus R. Clapp[4]	Fairbanks	08/78	02/24/82
Mary E. Greene[3]	Fairbanks	02/24/82	04/82

Barbara L. Schuhmann[4]	Fairbanks	07/82	02/24/88
Daniel L. Callahan	Fairbanks	02/24/88	02/24/94
Christopher E. Zimmerman[5]	Fairbanks	04/14/94	07/17/97
Paul J. Ewers	Fairbanks	07/18/97	02/23/00
Robert B. Groseclose	Fairbanks	04/05/00	02/23/06
James H. Cannon	Fairbanks	02/24/06	02/23/12
Aimee Oravec	**Fairbanks**	**04/10/12**	**02/23/18**
Raymond E. Plummer[2, 3]	Anchorage	02/24/59	09/26/61
Harold Butcher[4]	Anchorage	11/61	02/24/66
George F. Boney[5]	Anchorage	02/24/66	09/68
Lester W. Miller, Jr.[4]	Anchorage	10/15/68	02/24/72
Eugene F. Wiles[3]	Anchorage	02/24/72	03/75
Joseph L. Young[4]	Anchorage	04/75	02/24/78
Joseph L. Young	Anchorage	02/24/78	02/24/84
James D. Gilmore	Anchorage	02/24/84	02/24/90
Mark E. Ashburn	Anchorage	03/23/90	02/23/96
Robert H. Wagstaff	Anchorage	03/22/96	02/23/02
Susan Orlansky	Anchorage	03/14/02	02/27/08
Kevin Fitzgerald	**Anchorage**	**04/28/08**	**02/23/14**
Public Members			
Elmo LeRoy "Roy" J. Walker[2]	Fairbanks	05/18/59	05/18/61
John Cross	Kotzebue	05/18/61	05/18/67
Thomas K. Downes[3]	Fairbanks	05/18/67	Mid-1968
V. Paul Gavora[4]	Fairbanks	10/15/68	05/18/73
Thomas J. Miklautsch[3]	Fairbanks	05/28/73	12/10/74
Robert H. Moss[4]	Homer	12/10/74	05/18/79
Robert H. Moss	Homer	05/18/79	05/18/85
Dr. Hilbert J. Henrickson	Ketchikan	08/13/85	05/18/91
David A. Dapcevich	Sitka	05/19/91	05/18/97
Mary Matthews[3]	Fairbanks	05/19/97	08/23/98
Sandra Stringer[4]	Fairbanks	08/24/98	07/12/99
Katie Hurley	Wasilla	07/13/99	05/18/03
Bill Gordon	Fairbanks	05/19/03	03/01/09
Kathleen Tompkins-Miller	**Fairbanks**	**03/01/09**	**03/01/15**
Jack E. Werner[2]	Seward	05/18/59	05/18/63
Jack E. Werner	Seward	05/18/63	05/18/69
Ken Brady	Anchorage	06/28/69	05/18/75
Ken Brady	Anchorage	05/18/75	05/18/81
Mary Jane Fate	Fairbanks	05/18/81	05/18/87
Leona Okakok	Barrow	07/31/87	05/18/93
Janice Lienhart	Anchorage	05/19/93	05/18/99
Gigi Pilcher	Ketchikan	03/21/00	05/18/05
Christena Williams	Ketchikan	05/19/05	03/01/11

Donald Haase[3]	Valdez	03/01/11	04/07/11
Ken Kreitzer	**Juneau**	**07/29/11**	**03/01/17**
Dr. William M. Whitehead[2, 3]	Juneau	05/18/59	12/06/62
Charles W. Kidd[4, 3]	Juneau	04/63	01/64
H. Douglas Gray[4]	Juneau	04/64	05/18/65
H.O. Smith[6]	Ketchikan	05/18/65	06/65
Pete Meland[4]	Sitka	01/66	05/18/71
Oral Freeman[3]	Ketchikan	11/22/71	01/73
Lew M. Williams, Jr.[4]	Ketchikan	04/73	05/18/77
John Longworth	Petersburg	05/18/77	05/18/83
Renee Murray	Anchorage	08/08/83	05/18/89
Janis Roller[3]	Anchorage	09/01/89	02/14/91
Dr. Paul Dittrich, M.D.[4, 3]	Anchorage	04/06/91	10/03/91
Jim A. Arnesen[4]	Anchorage	10/04/91	05/18/95
Vicki A. Otte[3]	Juneau	05/31/95	11/21/00
Eleanor Andrews[4]	Anchorage	11/15/00	05/18/01
Eleanor Andrews	Anchorage	05/18/01	03/01/07
Charles M. Kopp[3]	Kenai	03/02/07	07/13/08
William F. Clarke[4]	Chugiak	10/16/08	03/01/13
Dave Parker	**Wasilla**	**03/01/13**	**03/01/19**

1 *The Judicial Council initially submitted nominations for the position of Chief Justice; the Constitution did not limit the Chief Justice's term. Chief Justice Nesbett and Chief Justice Boney were nominated and appointed in this manner. Voters amended the Constitution on August 25, 1970 to provide for the election of the Chief Justice by the justices of the Supreme Court for a three-year term; the amendment further provided that a Chief Justice may not be re-elected to consecutive terms.*

2 *Appointed to initial staggered term.*

3 *Resigned during term.*

4 *Appointed to complete unexpired term.*

5 *Resigned during term to apply for judicial office.*

6 *Denied legislative confirmation.*

Judicial Selection
in State High Courts

The Federalist Society
for Law and Public Policy Studies

Election

Partisan

Alabama
Illinois
Louisiana
New Mexico
Pennsylvania
Texas
West Virginia

Nonpartisan

Arkansas
Georgia
Idaho
Kentucky
Michigan
Minnesota
Mississippi
Montana
Nevada
North Carolina
North Dakota
Ohio
Oregon
Washington
Wisconsin

Democratic Appointment

Gubernatorial

California
Maine
New Jersey

Legislative

South Carolina
Virginia

Hybrid

Connecticut
Delaware
Hawaii
Maryland
Massachusetts
New Hampshire
New York
Rhode Island
Utah
Vermont

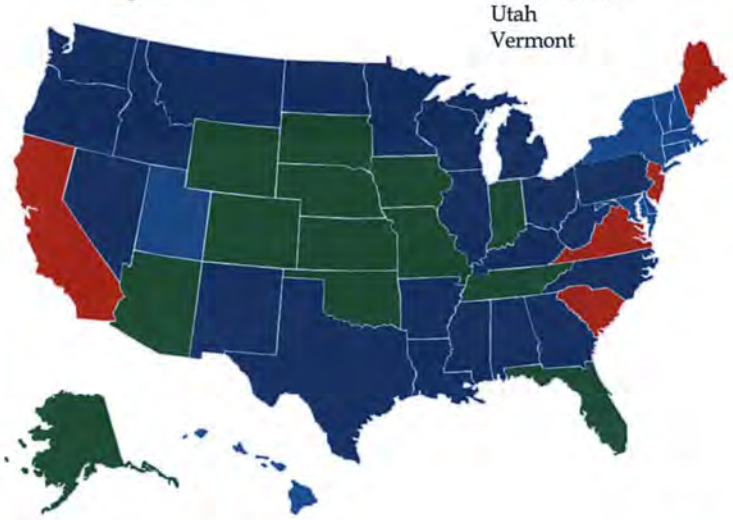
Missouri Plan

Role for Bar

Alaska
Arizona
Florida
Indiana
Iowa
Kansas
Missouri
Nebraska
Oklahoma
South Dakota
Wyoming

No Role for Bar

Colorado
Tennessee



Democratic Appointment
Judges are appointed directly by a democratic body, or appointed by the governor with the advice and consent of some democratic body.

Hybrid
Judges are appointed by the governor after nomination by a commission and confirmation by a democratic body.

Missouri Plan
Judges are appointed by the governor after nomination by a commission.

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The Missouri Plan in National Perspective

Stephen J. Ware[*]

The *Missouri Law Review*'s title for this symposium rightly recognizes the distinction between judicial selection and judicial retention.[1] We should distinguish the process that initially *selects* a judge from the process that determines whether to *retain* that judge on the court. Judicial selection and judicial retention raise different issues.[2] In this paper, I primarily focus on selection. I summarize the fifty states' methods of supreme court selection and place them on a continuum from the most populist to the most elitist.[3]

 Thanks to Michael Dimino, Richard E. Levy and Caroline Bader.

1. The symposium title is "Mulling over the Missouri Plan: A Review of State Judicial Selection and Retention Systems."

2. While differing views about judicial independence are central to the debate over judicial retention, they are at most peripheral to the issues involved in judicial selection. Stephen J. Ware, *Selection to the Kansas Supreme Court*, 17 KAN. J.L. & PUB. POL'Y 386, 406-07 & n.83 (2008). *See also* ALFRED P. CARLTON, JR., JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY 72 (2003), *available at* http://www.abanet.org/judind/jeopardy/pdf/report.pdf ("Discussions of judicial selection often overlook a distinction that the Commission regards as absolutely critical, between initial selection and reselection. . . . In the Commission's view, the worst selection-related judicial independence problems arise in the context of judicial reselection."); Michael R. Dimino, Sr., *Accountability Before the Fact*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 451, 460 (2008) ("Initial selections – whether by election or appointment – present quite different, and less substantial, hazards to judicial independence than do reelections and reappointments."); *id.* at 453-54 ("[T]he threat to judicial independence in the thirty-nine states that elect some of their judges comes primarily not from the system of initial judicial selection, but from the reelections that those judges are forced to contemplate and endure if they are to remain in office."); Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1276 (2008) ("[T]he primary threat to independence arises at the point of re-selection, when judges are put at risk of losing their jobs for unpopular decisions that they previously made."); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 285 (2008) ("Prejudging judges may raise any number of problems, but it is the postjudging of them that systematically threatens individual and minority rights and the rule of law."); Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 629 (2009) ("[U]nlike judges facing retention decisions, judges who do not need to appeal to voters shape their rulings to voters' preferences less. For example, voters' politics has little effect on the rulings of judges with permanent tenure or who plan to retire before the next election.").

3. *See* Tbl.1 *infra*, at 775. I am not the first to use the concepts of populism and elitism to describe debate over judicial selection. *See, e.g.*, Seth Andersen, *Examining the Decline in Support for Merit Selection in the States*, 67 ALB. L. REV. 793, 796-97 (2004) (referring to a "populist retort" and "charges of elitism"); Paul D. Carrington,

Doing so reveals that the Missouri Plan is the most elitist (and least democratic) of the three common methods of selecting judges in the United States. After highlighting this troubling characteristic of the Missouri Plan's process of *selecting* judges, I turn briefly to the *retention* of judges and caution against the dangers posed by subjecting sitting judges to elections, including the retention elections of the Missouri Plan. I conclude with support for a system that, in initially selecting judges, avoids the undemocratic elitism of the Missouri Plan and, in retaining judges, avoids the dangers (populist and otherwise) of judicial elections.

I. SUPREME COURT SELECTION IN THE FIFTY STATES

A. Democratic Selection Methods

While some states have individual quirks, three basic methods of supreme court selection prevail around the country: contestable elections, senate confirmation and the Missouri Plan.[4] The most common method, used by twenty-two states, is the contestable election.[5] Allowing two or more candi-

Judicial Independence and Democratic Accountability in Highest State Courts, 61 LAW & CONTEMP. PROBS. 79, 106 (1998) ("'Merit selection' is seen by many as a masquerade to put political power in the hands of the organized bar and other members of the elite."); Julius Uehlein & David H. Wilderman, *Opinion: Why Merit Selection Is Inconsistent with Democracy*, 106 DICK. L. REV. 769 (2002) ("Organized labor views the merit selection (political appointment) process as a wonderful public relations gimmick for disguising a power shift from the people to an elite crew – a completely undemocratic process that empowers non-elected lawyers and others to select judges with little or no accountability to the people."); Marie A. Failinger, *Can a Good Judge Be a Good Politician? Judicial Elections from a Virtue Ethics Approach*, 70 MO. L. REV. 433, 439 (2005) ("[M]ost traditional opponents of judicial merit selection . . . have argued that the process is elitist, secretive, unaccountable to and unreflective of the interests of citizens, and highly political."); John Copeland Nagle, *Choosing the Judges Who Choose the President*, 30 CAP. U. L. REV. 499, 512-13 (2002) ("Merit selection systems are even worse from the perspective of accountability – they are elitist."); THE JUDICIAL SELECTION TASK FORCE OF THE ASS'N OF THE BAR OF THE CITY OF N.Y., RECOMMENDATIONS ON THE SELECTION OF JUDGES AND THE IMPROVEMENT OF THE JUDICIAL SYSTEM IN NEW YORK 35 (2003), *available at* http://www.abcny.org/pdf/Judicial%20selection%20task%20force.pdf ("A recurring criticism of merit selection is that it is elitist.").

4. *See infra* text accompanying notes 5, 10 & 34. In two states, Virginia and South Carolina, supreme court justices are appointed by the legislature. Ware, *supra* note 2, at 388 & n.9.

5. Ware, *supra* note 2, at 389 & n.13. In some states, interim vacancies (that occur during a justice's uncompleted term) are filled in a different manner from initial vacancies. *See* AM. JUDICATURE SOC'Y, METHODS OF JUDICIAL SECTION, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (last visited Apr. 20, 2009). Several states that use elections to fill initial vacancies use nominating commissions to fill interim vacancies. *Id.*

dates to run for a seat on the supreme court is the most populist of the three methods because it puts power directly in the hands of the people, the voters.[6] Importantly, members of the bar get no special powers. "[A] lawyer's vote is worth no more than any other citizen's vote."[7]

The second common method of selecting state supreme court justices[8] is the one used to select federal judges: executive nomination followed by senate confirmation.[9] In twelve states, the governor nominates state supreme court justices, but the governor's nominee does not join the court unless confirmed by the state senate or similar popularly elected body.[10]

Senate confirmation is a less populist method of judicial selection than contestable elections because senate confirmation is less directly dependent on the "wisdom . . . of the common people."[11] While contestable judicial elections "embody the passion for direct democracy prevalent in the Jacksonian era[,] . . . senate confirmation exemplifies the republicanism of our Nation's Founders."[12] Senate confirmation is part of the Founders' "system of

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6. A populist is "a believer in the rights, wisdom, or virtues of the common people." Merriam-Webster OnLine Dictionary: Populism, http://www.merriam-webster.com/dictionary/populism (last visited Apr. 16, 2009).

7. Ware, *supra* note 2, at 390.

8. The judges on some states' highest courts are not called "justices," and in some states the highest court is not called the "supreme court." Nevertheless, I use the common term "supreme court justices" to speak generally about high court judges and avoid terminology variations from state to state.

9. U.S. CONST. art. II, § 2, cl. 2.

10. Ware, *supra* note 2, at 388, 389 & nn.11-12. Confirmation is done by the state senate in Delaware, Hawaii, Maine, Maryland, New Jersey, New York, Utah and Vermont; by the entire legislature in Connecticut and Rhode Island; and by the governor's council in Massachusetts and New Hampshire. A thirteenth state, California, can be added. Its confirmation body is a three-person commission made up of the chief justice, attorney general and most senior presiding justice of the court of appeals in California. *Id.*

The previous paragraph's categorization of states is similar to that found in an article by Joshua C. Hall & Russell S. Sobel, *Is the 'Missouri Plan' Good for Missouri? The Economics of Judicial Selection*, SHOW-ME INST. POL'Y STUDY NO. 15, May 21, 2008, at 10-11, http://showmeinstitute.org/docLib/20080515_smi_study_15.pdf. However, Hall and Sobel distinguish the "executive council[s]" used for confirmation in California, Massachusetts and New Hampshire from the legislatures used for confirmation in other states on the ground that those three councils are "usually governor-appointed." *Id.* at 11. In fact, however, Massachusetts and New Hampshire elect their councils. *See* MASS. CONST. pt. 2, ch. 2, § 1, art. 9; *id.* amend. art. XVI; N.H. CONST. pt. 2, arts. 46, 60-61. And California elects its attorney general. CAL. CONST. art. 5, § 11.

11. Merriam-Webster OnLine Dictionary: Populism, *supra* note 6.

12. Ware, *supra* note 2, at 406. On Nineteenth Century debates about contestable elections versus senate confirmation and legislative appointment of judges, see Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190 (1993); Kermit L. Hall,

indirect democracy in which the structure of government mediates and cools the momentary passions of popular majorities."[13]

Although not as populist as the direct democracy of contestable judicial elections, senate confirmation does make judicial selection indirectly accountable to the people because, at the federal level, the people elect their senators[14] and, through the Electoral College, the President.[15] Similarly, in states that use this method of judicial selection, the people elect their governors and state senators.

In other words, senate confirmation is – like contestable elections – fundamentally *democratic*,[16] although it is less populist than contestable elections. Senate confirmation is democratic because it facilitates the "rule of the majority"[17] by adhering to the principle of one-person-one-vote. At the federal level, one-person-one-vote is tempered by federalism, as both the U.S. Senate and Electoral College give disproportionate weight to voters in low-population states.[18] But at the state level nothing similarly tempers the democratic nature of senate confirmation. In those states in which the governor may appoint to the court whomever he or she wants,[19] subject only to confirmation by a popularly elected body such as the state senate, judicial selection

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Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920, 1984 AM. B. FOUND. RES. J. 345 (1984); F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431, 445-48 (2004); Roy A. Schotland, *Myth, Reality Past and Present, and Judicial Elections*, 35 IND. L. REV. 659, 661-62 (2002).

13. Ware, *supra* note 2, at 406. Prior to the direct election of senators, they were chosen by the state legislatures, U.S. CONST. art. 1, § 3, cl. 1, so popular accountability was even more indirect.

14. U.S. CONST. amend. XVII.

15. U.S. CONST. art. 2, §1, cl. 2.

16. Democracy is "government by the people; *especially*: rule of the majority [; or] a government in which the supreme power is vested in the people and exercised by them directly or indirectly through a system of representation usually involving periodically held free elections." Merriam-Webster OnLine Dictionary: Democracy, § 1.a.-b., http://www.merriam-webster.com/dictionary/democracy (last visited Apr. 16, 2009) (emphasis added). As Professor Jeffrey Jackson puts it,

> Judicial elections, for all of their problems, fit well within the democratic system, in that judges are selected through a direct vote of the public. Even appointments, such as those in the federal system, have a basis in the democratic process, in that the appointments are made by a popularly-elected official holding a national or state-wide office, with the choice then confirmed by a popularly-elected representative body.

Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System*, 34 FORDHAM URB. L.J. 125, 146 (2007).

17. Merriam-Webster OnLine Dictionary: Democracy, *supra* note 16, at § 1.a.

18. U.S. CONST. art. 1, § 3, cl. 1 (Senate); *id.* art. 2, § 1, cl. 2 (Electoral College).

19. *See infra* note 32.

is laudably democratic because governors and state senators are elected under the principle of one-person-one-vote. In these elections, members of the bar get no special powers. Again, a lawyer's vote is worth no more than any other citizen's vote.

B. Departures from Democracy: Varying Levels of Elitism in Judicial Selection

Some senate-confirmation states, however, have supreme court selection processes that do give special powers to members of the bar. As the bar is an elite segment of society,[20] states that give lawyers more power than their fellow citizens are rightly described as *elitist*. Indeed the rationale for giving lawyers special powers over judicial selection – lawyers are better than their fellow citizens at identifying who will be a good judge[21] – is openly elitist.[22] A mixture of this elitism (special powers for lawyers) and democracy (senate confirmation of gubernatorial nominees) characterizes the states discussed in the following four paragraphs.

While the President may nominate anyone to the U.S. Supreme Court, in some senate-confirmation states the governor is restricted in whom he or she may nominate to the state supreme court. For example, New York restricts whom the governor may nominate to its highest court, the court of appeals.[23]

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20. Among the dictionary definitions of "elite" is "a group of persons who by virtue of position or education exercise much power or influence." Merriam-Webster OnLine Dictionary: Elite, § 1.d., http://www.merriam-webster.com/dictionary/elite (last visited Apr. 16, 2009). In the United States, of course, lawyers tend to have above-average levels of education and income. According to the Bureau of Labor Statistics, the average lawyer in the United States earns $118,280, while the average person earns $40,690. Bureau of Labor Statistics, Occupational Employment Statistics, May 2007 National Occupational Employment and Wage Estimates, United States, http://www.bls.gov/oes/2007/may/oes_nat.htm#b00-0000 (last visited Apr. 16, 2009). Nearly all lawyers have a post-graduate degree, while only 10% of Americans do. SARAH R. CRISSEY, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2007, at 3 (U.S. Census Bureau 2009), *available at* http://www.census.gov/prod/2009 pubs/p20-560.pdf. Lawyers tend to be powerful and influential. (Is it just a coincidence that every Democratic nominee for President or Vice President since 1984 has had a law degree?)

21. *See, e.g.*, Linda S. Parks, *No Reform is Needed*, J. KAN. B. ASS'N, Feb. 2008, at 4 ("'Lawyers, because of their professional expertise and interest in the judiciary, are well suited to recognize which candidates for judgeship are especially knowledgeable and skilled lawyers.' That's exactly why lawyers serve on the [Judicial Nominating] Commission. If you have a serious medical condition, you don't turn to a neighbor or a politician to find a specialist.") (quoting Ware, *supra* note 2, at 396).

22. Among the definitions of "elite" is "the best of a class." Merriam-Webster OnLine Dictionary: Elite, *supra* note 20, § 1.b. The argument is that lawyers are the best (among the class of citizens) at assessing potential judges.

23. N.Y. CONST. art. VI, § 2(e).

The New York Constitution provides that "[t]he governor shall appoint, with the advice and consent of the senate, from among those recommended by the judicial nominating commission."[24] The judicial nominating commission in New York consists of twelve members: four appointed by the governor, four by the chief judge of the court of appeals, and four by leaders of the legislature.[25] Of these twelve members, at least four must be members of the New York bar.[26] This special quota for lawyers is the only one in New York; no other occupational group (or other group) is guaranteed representation on the state's judicial nominating commission.[27] The "lawyers' quota" guarantees that lawyers, compared to their percentage of the state's population, will be over-represented on the commission.[28] As a result, New York gives the members of its bar disproportionate power in the selection of the state's high court judges. In judicial selection, New York gives its lawyers a special power not given to other citizens.

New York is not alone. Three other states with senate confirmation of supreme court justices also (1) require their governors to nominate only someone recommended by a nominating commission and (2) give lawyers a quota on that commission.[29] By introducing these two factors, these states make judicial selection less democratic and more elitist than it would otherwise be.[30] In these states (including New York), however, the movement from democracy to elitism is relatively small because all members of the commission are appointed by popularly elected officials or by judges who

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24. *Id.*

25. N.Y. CONST. art. VI, § 2(d)(1).

26. *Id.* ("Of the four members appointed by the governor, no more than two shall be enrolled in the same political party, two shall be members of the bar of the state, and two shall not be members of the bar of the state. Of the four members appointed by the chief judge of the court of appeals, no more than two shall be enrolled in the same political party, two shall be members of the bar of the state, and two shall not be members of the bar of the state."). No such restrictions are placed on the members appointed by leaders of the legislature. *Id.*

27. *Id.*

28. As of the end of calendar year 2008, there were a total of 244,418 registered New York attorneys, and, of that total, 153,552 reported an address within New York State. E-mail from Sam Younger, Deputy Director, New York State Office of Court Administration, to Professor Stephen J. Ware (Apr. 21, 2009) (on file with author). New York State has over nineteen million people. POPULATION DIVISION, U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR THE UNITED STATES, REGIONS, STATES, AND PUERTO RICO: APRIL 1, 2000 TO JULY 1, 2008 (2008), http://www.census.gov/popest/states/NST-ann-est.html (follow "Excel" or "CSV" hyperlink).

29. *See* Ware, *supra* note 2, at 388-89 & nn.10-11. These states are Connecticut, Rhode Island and Utah. *Id.* As noted above, Connecticut and Rhode Island require confirmation by the entire legislature, not just the senate. *See supra* note 10.

30. Some states have one, but not the other, of these two factors. *See infra* note 32.

have been nominated and confirmed by popularly elected officials. In other words, the populace retains ultimate control over appointments to the judicial nominating commission. The democratic principle of one-person-one-vote is followed, albeit indirectly.

By contrast, two other senate-confirmation states go further down the road from democracy to elitism by allowing the bar to *select* some members of the nominating commission.[31] In these states, not all of the commissioners – who exercise the important governmental power of restricting the governor's choice of judicial nominees – are selected under the democratic principle of one-person-one-vote. Rather, some of the commissioners are selected by a small, elite group: the bar.[32]

This is really quite startling. Where else in our federal or state governments are public officials selected in such an undemocratic way? Where else do members of a particular occupation have, by law, greater power than their fellow citizens to select public officials? When this sort of favoritism for an

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31. *See* Ware, *supra* note 2, at 388-89 & nn.10-11. These states are Hawaii and Vermont. *Id.*

32. More democratic, and less elitist, are states that give lawyers a quota on the nominating commission or allow the bar to select some of the commission but do not require their governors to nominate someone recommended by the nominating commission. In these states, the bar's disproportionate influence over the commission may give lawyers greater power than other citizens, but the greater power of lawyers is clearly subordinate to the power of the popularly elected governor. The governor is not required to nominate someone recommended by the commission because the commission's existence derives not from the state constitution, but merely from an executive order which the governor may rescind. *See* Del. Exec. Order No. 4 (Mar. 27, 2009), *available at* http://governor.delaware.gov/orders/exec_order_4.shtml (commission consists of nine members: eight appointed by governor – four lawyers and four nonlawyers – and one appointed by president of bar association, with consent of governor); Me. Exec. Order No. 9 FY 94/95 (Feb. 10, 1995) (five members, all appointed by the governor); Mass. Exec. Order 500 (March 13, 2008), *available at* http://www.mass.gov/?pageID=gov3terminal&L=3&L0=Home&L1=Legislation+%26+Executive+Orders&L2=Executive+Orders&sid=Agov3&b=terminalcontent&f=Executive+Orders_executive_order_500&csid=Agov3 (twenty-one members, all appointed by governor); Md. Exec. Order No. 01.01.2007.08 (Apr. 27, 2007) *available at* http://www.gov.state.md.us/executiveorders/01.07.08JudicialNominating Commissions.pdf (seventeen members, twelve appointed by governor, five by president of bar association); N.H. Exec. Order, 2005-2, *available at* http://www.nh.gov/governor/orders/documents/Exec_Order_Judicial_Selection_Comm2.pdf (eleven members, all appointed by governor, consisting of six lawyers and five nonlawyers); N.J. Exec. Order No. 36 (Sept. 22, 2006), *available at* http://www.state.nj.us/infobank/circular/eojsc36.htm (seven members, all appointed by governor, including five retired judges). Also, California probably belongs in this category of states that do not require their governors to nominate someone recommended by the commission. *See* Ware, *supra* note 2, at 388-89 nn.10 & 12.

occupational group other than lawyers has been attempted, it has, in at least one instance, been found unconstitutional.[33]

C. The Most Elitism: The Missouri Plan

While the states discussed in the previous section have departed from the democratic principle of one-person-one-vote (and from the U.S. Constitution's model) to give special powers to the bar, they have nevertheless retained senate confirmation of the governor's nominees for the supreme court. In other words, they have introduced an element of elitism to the early part of the judicial selection process (whom can the governor pick?), while keeping the later part of the process (will the governor's pick be confirmed?) in the hands of democratically elected officials. By contrast, the third common

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33. *See* Hellebust v. Brownback, 42 F.3d 1331 (10th Cir. 1994). In *Hellebust*, the Tenth Circuit found that Kansas's statutory procedure for electing members to the Kansas State Board of Agriculture (Board) violated the Fourteenth Amendment of the U.S. Constitution. *Id.* at 1332. That Amendment's Equal Protection Clause requires states to follow the principle of "one person, one vote" in most elections. *Id.* at 1333 (citing Reynolds v. Sims, 377 U.S. 533 (1964)). Kansas violated this principle by giving the power to elect the Board to delegates from private agricultural associations including

> county agricultural societies, each state fair, each county farmer's institute, each livestock association having a statewide character, and each of the following with at least 100 members: county farm bureau associations, county granges, county national farmer's organizations, and agricultural trade associations having a statewide character.

Id. at 1332 n.1. As the Tenth Circuit explained, "In the line of cases stemming from *Reynolds*, '[t]he consistent theme . . . is that the right to vote in an election is protected by the United States Constitution against dilution or debasement.'" *Id.* at 1333 (quoting Hadley v. Junior Coll. Dist., 397 U.S. 50, 54 (1970)). After the Kansas statute was declared unconstitutional,

> much attention . . . focused on the possibility that agricultural groups might be given the power to provide the Governor a list of nominees from which the Board must be selected. Such an option appeared attractive to many legislators as a means of preserving the essence of the former system. A similar method of selection is used for various professional organizations and, most prominently, the Kansas Supreme Court.

Richard E. Levy, *Written Testimony of Richard E. Levy Before the House Agriculture Committee, State of Kansas*, 42 U. KAN. L. REV. 265, 282 (1994) (footnotes omitted). Professor Levy opines that "this approach might pass equal protection scrutiny on the grounds that 'appointment' rather than 'election' is involved," because "[m]any cases suggest that the 'one person, one vote' principle does not apply to appointments." *Id.* at 282 & n.118. However, he notes that "these cases involve appointments by elected officials who themselves are chosen in compliance with that principle." *Id.* at 282 n.118. As explained below, the core problem of the Missouri Plan is that not all members of the nominating commission are appointed by such officials. *See infra* Part II.A.

method of supreme court selection, the "Missouri Plan,"[34] has the early-stage elitism without the later-stage democracy.[35] The Missouri Plan gives disproportionate power to the bar in selecting the nominating commission, while eliminating the requirement that the governor's pick be confirmed by the senate or similar popularly elected body.[36]

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34. The "Missouri Plan" states are Alaska, Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Missouri, Oklahoma, Nebraska, South Dakota, Tennessee and Wyoming. *See infra* note 36. The "Missouri Plan" was named after the first state to adopt it, in 1940. Unfortunately, some people call this method of selecting judges "merit selection." *See infra* note 38 and accompanying text.

35. Some readers may wonder if the Missouri Plan's retention elections provide later-stage democracy. Here, then, we can remind ourselves of the crucial distinction between judicial selection and judicial retention. *See supra* note 2. The "later stage" discussed here is the later stage of judicial selection. Judicial retention is a separate topic, and retention elections are discussed below. *See infra* Part II.C.

36. *See* ALASKA CONST. art. IV, §§ 5, 8 (nominating commission consists of seven members: chief justice, three lawyers appointed by governing body of the organized bar, three non-lawyers appointed by governor subject to confirmation by legislature); ARIZ. CONST. art. VI, § 36.A (sixteen members: chief justice, five lawyers nominated by governing body of bar and appointed by governor with advice and consent of senate, ten nonlawyers appointed by governor with advice and consent of senate); COLO. CONST. art. VI, § 24 (fifteen voting members: eight nonlawyers appointed by governor, seven lawyers appointed through majority action of governor, attorney general and chief justice); FLA. CONST. art. V, § 11(d) (1998); FLA. STAT. ANN. § 43.291.1(a)-(b) (nine members: four lawyers appointed by governor from lists of nominees submitted by board of governors of bar association, five other members appointed by governor with at least two being lawyers or members of state bar); IND. CONST. of 1851, art. VII, §§ 9–10 (1970); IND. CODE ANN. §§ 33-27-2-2, -2-1 (LexisNexis 2007) (seven members: chief justice, three lawyers elected by members of bar, three nonlawyers appointed by governor); IOWA CONST. of 1857, art. V, § 16 (1962); IOWA CODE §§ 46.1–.2, .15 (2006) (fifteen members: chief justice, seven lawyers elected by members of bar, seven nonlawyers appointed by governor and confirmed by senate); KAN. CONST. art. 3 § 5(e) (nine members: five lawyers elected by bar, four nonlawyers appointed by the governor); MO. CONST. of 1945, art. V, § 25(a)-(d) (1976); MO. SUP. CT. R. 10.03 (seven members: one supreme court judge chosen by members of court, three lawyers elected by members of bar, three nonlawyers appointed by governor); NEB. CONST. of 1875, art. V, § 21 (1972); NEB. REV. STAT. ANN. §§ 24-801to 24-812 (LexisNexis 2007) (nine members: chief judge, four lawyers elected by members of bar, four nonlawyers appointed by governor); OKLA. CONST. art. VII-B, § 3 (thirteen members: six lawyers elected by members of bar, six nonlawyers appointed by governor and one nonlawyer elected by other members); S.D. CODIFIED LAWS § 16-1A-2 (2007) (seven members: three lawyers appointed by president of bar, two circuit judges elected by judicial conference, and two nonlawyers appointed by governor); TENN. CODE ANN. §§ 17-4-102, -106, -112 (2007) (seventeen members: speakers of senate and house each appoint six lawyers, twelve total, from lists submitted by Tennessee Bar Association (two), Tennessee Defense Lawyers Association (one), Tennessee Trial Lawyers Association (three), Tennessee District Attorneys General Conference (three), and Tennessee Association for Criminal

The Missouri Plan states' lack of confirmation by the senate (or other popularly elected body) is significant. In senate-confirmation states, if the senate refuses to confirm any of the nominating commission's first group of nominees then the commission must propose one or more additional nominees to get someone appointed to the court. By contrast, in Missouri Plan states, if the governor refuses to appoint any of the commission's first group of nominees then one of those nominees joins the court anyhow.[37] So the Missouri Plan gives the commission more power to force one of its favorites on the democratically elected officials. The commission is weaker, relative to democratically elected officials, in senate-confirmation states. Thus, Missouri Plan states are less democratic (and more elitist) than senate-confirmation states.

This important distinction between Missouri Plan states and senate-confirmation states is obscured when all judicial selection methods are reduced to two types: elective and appointive. In fact, the choice is not just between electing judges and appointing them. As this article has shown, many appointive systems exist, and they vary widely in the extent to which they depart from democratic principles to give special powers to the bar. Clarity requires distinguishing Missouri Plan states from senate-confirmation states. Unfortunately, prominent bar groups use the term "merit selection" to describe all of these states, so long as they use a nominating commission of

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Defense Lawyers (three); the speakers also each appoint one lawyer not nominated by an organization and each appoint one nonlawyer and jointly appoint a third nonlawyer); WYO. CONST. art. V, § 4; WYO. STAT. ANN. § 5-1-102 (2007) (seven members: chief justice, three lawyers elected by members of bar, three nonlawyers appointed by governor).

37. *See, e.g.*, MO. CONST. art. V, § 25(a) ("If the governor fails to appoint any of the nominees within sixty days after the list of nominees is submitted, the nonpartisan judicial commission making the nomination shall appoint one of the nominees to fill the vacancy."); KAN. CONST. art. 3 § 5(b) ("In event of the failure of the governor to make the appointment within sixty days from the time the names of the nominees are submitted to him, the chief justice of the supreme court shall make the appointment from such nominees."); OKLA. CONST. art. VII-B, § 4 ("The Governor shall appoint one (1) of the nominees to fill the vacancy, but if he fails to do so within sixty (60) days the Chief Justice of the Supreme Court shall appoint one (1) of the nominees.").

The importance of this power was demonstrated in Missouri where the governor publicly considered the possibility of refusing to appoint any of the three nominees submitted to him by the supreme court nominating commission. *See* Editorial, *Blunt Trauma*, WALL ST. J., Sept. 17, 2007, at A16. The governor ultimately did appoint one of the nominees, and his capitulation to the commission has been explained by the fact that if he did not appoint one of those three then the commission would exercise its power to appoint one of the three. *Id.* By contrast, the commission lacks this power to ensure that one of its nominees becomes a justice where appointment requires confirmation by the senate or other publicly elected officials. The body with the power to withhold confirmation has the power to send the commission "back to the drawing board" to identify additional nominees if none of the original nominees wins confirmation.

any sort.[38] This term, "merit selection," is "propagandistic"[39] and obscures important distinctions among appointive systems. Accordingly, I suggest that people reject the term "merit selection" in favor of the more-neutral "Mis-

38. The leader in this regard seems to be the American Judicature Society (AJS). Under the heading "Judicial Selection in the States . . . 'Initial Selection: Courts of Last Resort,'" AJS claims that at the supreme court level, three states select judges by gubernatorial appointment, two by legislative appointment, eight by partisan election, thirteen by non-partisan election and twenty-five (including the District of Columbia) by merit selection. AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS 6 (2007), http://www.ajs.org/selection/docs/Judicial%20Selection%20Charts.pdf. Among the twenty-four states AJS claims for "merit selection" are ten states with confirmation by the senate or similar popularly elected body: Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, Utah and Vermont. *Id.*

> While today AJS conducts a wide variety of programs, the advocacy of and education about the merit selection of judges as an alternative to the elective system has, since its formation, been the cornerstone of its activities. AJS was formed in 1913 with the general progressive mission of improving the 'efficiency' of the administration of justice.
>
> The founders of AJS shared the commonplace Progressive belief that the solution to most of the country's problems lay in more efficient public administration. The Society's negative attitude toward the election of judges, for example, was part of a widespread denigration of partisan politics. Progressives tended to view partisanship as productive of inefficiency in governance and to believe that government should be run like a business corporation.

Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 7-8 (1994) (footnotes omitted). In 1928, AJS endorsed a process in which nominations presented to the governor would come from a committee of the bar. *Id.* at 9.

> Then, in 1937, the [American Bar Association] adopted the merit plan. It proposed:
>
> (a) The filling of vacancies by appointment by the executive or other elective official or officials, but from a list named by another agency, composed in part of high judicial officers and in part of other citizens, selected for the purpose, who hold no other public office.
>
> (b) *If further check upon appointment be desired, such check may be supplied by the requirement of confirmation by the State Senate or other legislative body* of appointments made through the dual agency suggested.
>
> (c) The appointee shall after a period of service be eligible for reappointment periodically thereafter or go before the people upon his record with no opposing candidate, the people voting upon the question, Shall Judge Blank be retained in office?

Id. at 9-10 (emphasis added) (footnotes omitted).

39. *See* Michael R. Dimino, *The Futile Quest for a System of Judicial "Merit" Selection*, 67 ALB. L. REV. 803 (2004) ("Merit selection – purely, so far as I can tell, [is] a propagandistic misnomer.").

souri Plan" and that people reserve the term "Missouri Plan" for states that lack confirmation by the senate or similar popularly elected body.

With this terminology established, we can then make a further distinction, a distinction among Missouri Plan states. These states can be placed into two categories, which I call "soft" Missouri Plan and "hard" Missouri Plan. (See Table 1 *infra* page 775.) The four soft Missouri Plan states have a lawyers' quota on the nominating commission, but *all* members of the commission are selected by a process that includes popularly elected officials.[40] In these states – Arizona, Colorado, Florida and Tennessee – the bar's role in selecting members of the commission is either non-existent or limited to "merely suggesting names for . . . the commission and those suggested do not become commissioners unless approved by the governor and/or legislature."[41] So the elitism of the lawyers' quota on the commission is balanced to some extent by the role of popularly elected officials in appointing the commission.

Even that balance is lacking in the "hard" Missouri Plan states. These nine states go further than any others in maximizing the power of the bar. Not only do these states have a lawyers' quota on the commission, but the quota is also a majority of the commission. Each of these states' constitutions requires that a majority of the commissioners be lawyers or judges.[42] More importantly, popularly elected officials play no role in selecting *which lawyers* fill the lawyers' quota on the commission. Instead, the bar selects the lawyers on the commission.[43] To reiterate, the lawyer-commissioners (who

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40. *See* COLO. CONST. art. VI, § 24 (commission consists of fifteen voting members: seven lawyers appointed through majority action of governor, attorney general, and chief justice, eight nonlawyers appointed by governor); ARIZ. CONST. art. VI, § 36.A (sixteen members: chief justice, five lawyers nominated by governing body of bar and appointed by governor with advice and consent of senate, ten nonlawyers appointed by governor with advice and consent of senate); FLA. CONST. art. V, § 11(d) (1998); FLA. STAT. ANN. § 43.291.1(a)-(b) (West 2008) (nine members: four lawyers appointed by governor from lists of nominees submitted by board of governors of bar association, five other members appointed by governor with at least two being lawyers or members of state bar); TENN. CODE ANN. §§ 17-4-102, -106, -112 (2007) (seventeen members: speakers of senate and house each appoint six lawyers, twelve total, from lists submitted by Tennessee Bar Association (two), Tennessee Defense Lawyers Association (one), Tennessee Trial Lawyers Association (three), Tennessee District Attorneys General Conference (three), and Tennessee Association for Criminal Defense Lawyers (three); the speakers also each appoint one lawyer not nominated by an organization, each appoint one nonlawyer, and jointly appoint a third nonlawyer). Tennessee is the "hardest" of the soft Missouri Plan states because popularly elected officials have the least power (relative to the bar) in selecting commissioners.

41. Ware, *supra* note 2, at 388 & n.8.

42. These states are Alaska, Indiana, Iowa, Kansas, Missouri, Nebraska, Oklahoma, South Dakota and Wyoming. *See supra* note 36.

43. *Id.* My state of Kansas is the "hardest" Missouri Plan state of all because it gives the bar more power than even the other hard Missouri Plan states. The Kansas

exercise the important governmental power of restricting the governor's choice of judicial nominees) are not selected in accordance with democratic

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bar selects five of the nine members of the Kansas Supreme Court Nominating Commission. *Id.* Kansas is the only state that allows the bar to select a majority of "a nominating commission that has the power to ensure that one of its initial nominees becomes a justice." Ware, *supra* note 2, at 391. This differs from some other Missouri Plan states, in which bar-selected lawyers, plus a supreme court justice, constitute a majority of the commission. What is the difference between having a justice on the commission and (the Kansas system) having another bar-selected member on the commission? There is some difference because supreme court justices are different from other members of the bar. Even in "hard" Missouri Plan states, to become a justice one must be chosen (over other nominees) by the popularly elected governor, and to remain a justice one must win a retention election open to all registered voters. *See* ALASKA. CONST. art. IV, § 5 (governor shall fill any vacancy on supreme court "by appointing one of two or more persons nominated by the judicial council"); *see also id.* § 6 (justice "subject to approval or rejection . . . at the first general election held more than three years after his appointment," and thereafter every ten years); IND. CONST. art. VII, § 10 (governor shall fill vacancy on supreme court "from a list of three nominees presented to him by the judicial nominating commission"); *see also id.* § 11 (justice subject to approval or rejection at general election two years after appointment, and thereafter every ten years); IOWA CONST. art. V, § 15 (governor fills vacancies on the supreme court from list of three nominees submitted by judicial nominating commission); *see also id.* § 17 (justice subject to retention or rejection at first judicial election held more than one year after appointment, and thereafter every eight years); MO. CONST. art. V, § 25(a) (governor shall fill vacancy in supreme court by appointing one of three persons nominated by judicial commission); *see also id.* §§ 19, 25(c)(1) (justice subject to approval or rejection at first general election held more than twelve months after appointment, and thereafter every twelve years); NEB. CONST. art. V, § 21(1) (governor shall fill any vacancy in the supreme court "from a list of at least two nominees presented to him by the . . . judicial nominating commission"); *see also id.* § 21(3) (justice subject to approval or rejection at next general election more than three years from the date of appointment, and thereafter every six years); OKLA. CONST. art. VII-B, § 4 (governor shall fill vacancy on supreme court with one of three nominees chosen by Judicial Nominating Commission); *see also id.* § 5 (justice subject to approval or rejection at first general election more than one year after appointment, and thereafter every six years); S.D. CONST. art. V, § 7 (governor shall fill vacancy on supreme court from list of nominees chosen by the judicial qualifications commission); *see also id.* (justice subject to approval or rejection at "first general election following the expiration of three years from the date of his appointment," and thereafter every eight years); WYO. CONST. art. 5, § 4(b) (governor shall fill vacancy on supreme court from list of three nominees submitted by judicial nominating commission); *see also id.* § 4(f), (g) (justice subject to approval or rejection at next general election more than one year after his appointment, and thereafter every eight years). So although these factors do not confer upon justices as much democratic legitimacy as advocates of the Missouri Plan sometimes claim, *see infra* Part II.C, they do confer some degree of democratic legitimacy. Thus, the states whose nominating commissions include a justice (rather than another bar-selected commissioner, as in Kansas) do have a supreme court selection process with a bit more democratic legitimacy than Kansas.

principles of equality. These commissioners are not selected by officials elected under the democratic principle of one-person-one-vote. Rather, they are selected by a small, elite group: the bar.[44]

For this reason, judicial selection under the Missouri Plan lacks democratic legitimacy.

II. THE MISSOURI PLAN'S LACK OF DEMOCRATIC LEGITIMACY

A. The Core Problem of the Missouri Plan

The Missouri Plan's lack of democratic legitimacy is explained by Professor Jeffrey Jackson:

> A commission system [of judicial selection] carries an even greater burden to demonstrate legitimacy than other systems, such as elections or appointments. Judicial elections, for all of their problems, fit well within the democratic system, in that judges are selected through a direct vote of the public. Even appointments, such as those in the federal system, have a basis in the democratic process, in that the appointments are made by a popularly-elected official holding a national or state-wide office, with the choice then confirmed by a popularly-elected representative body.
>
> Commission systems, on the other hand, do not fit so neatly within this democratic framework. While judges in a commission system are appointed by a popularly-elected official, the official's choice is not unfettered. Rather, the choice is made from a pool selected by an unelected commission. Further, although some members of the commission are generally appointed by an elected official, others are not. In particular, many commissions have lawyer members that gain their seats, either through election by a minority of the persons, i.e. lawyers in their area, or through nomination by special interest groups. The composition of nominating commissions thus raises some serious concerns with regard to legitimacy.[45]

As Professor Jackson says, contestable elections and senate confirmation (at least of the sort found in the U.S. Constitution) have democratic legi-

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44. Mary L. Volcansek, *The Effects of Judicial-Selection Reform: What We Know and What We Do Not*, *in* THE ANALYSIS OF JUDICIAL REFORM 79, 86-87 (Philip L. Dubois ed., 1982) ("Officials of state bar associations have been the first to admit that the merit selection system provides them with the most effective means of influencing the choice of who will serve on the bench."). Perhaps they have admitted this less readily in recent years as bar control over judicial selection has become more controversial.

45. Jackson, *supra* note 16, at 146 (footnotes omitted).

timacy. And even commission systems have democratic legitimacy insofar as members of the nominating commission are appointed by popularly elected officials. Democratic principles are violated, however, when members of the commission are selected by "a minority of the persons, i.e. lawyers in their area."[46] This, of course, is the core of the Missouri Plan – allowing the bar to select some of the commission and then declining to offset that bar power with confirmation by the senate or other popularly elected body.[47] And it is this core that deprives the Missouri Plan of democratic legitimacy.

Professor Jackson continues:

> The idea of mandating lawyer participation in the selection of judges is unique to the commission system and also unique in the democratic system. As a result, it requires special justification if it is to be considered legitimate.[48]
>
> Most of the commission systems in the United States use the state bar, either through its board of governors or through direct election of its members, to select the lawyer members. From a legitimacy standpoint, this is a questionable system. Membership in the state bar does not have a connection to the democratic function, and judges selected through the use of this system are open to charges that they are simply tools of the lawyers running the state bar.[49]
>
> Moreover, this problem is not entirely solved by placing the final selection in the hands of the governor, an elected official, or by juxtaposing the non-lawyer members with lay members who are appointed through some other process. Rather, because the governor's choices are generally limited to the slate given to her by the commission, the system can be perceived as vulnerable to "panel stacking," wherein the commission submits a combination of nominees that offers the governor little real choice. Even if lay members are added to the process, there is the problem that a large part of the selection system is being delegated to persons who are not subject to the democratic process.[50]

So the Missouri Plan's lack of democratic legitimacy is not cured by the fact that the governor gets to choose among the commission's nominees and gets to appoint some members of the commission. The Missouri Plan nevertheless violates basic democratic principles of equality because some members of the commission are selected by the bar. The problem is not that there

46. *Id.*
47. *See supra* notes 34-38 and accompanying text.
48. Jackson, *supra* note 16, at 148.
49. *Id.* at 153 (footnotes omitted).
50. *Id.* at 153-54 (footnote omitted).

is a nominating commission nor even so much that lawyers get a quota of seats on that commission. The core problem of the Missouri Plan is how those lawyers are selected.

Professor Jackson rightly concludes that democratic legitimacy

> would appear to favor a reduction in the influence of the state bar and its members over the nominating commission because they do not fit within the democratic process. Rather, the more desirable system from a legitimacy standpoint would have a greater number of the commission's members selected through means more consistent with the concept of representative government.[51]

To ensure the democratic legitimacy of a nominating commission, none of its members should be selected by the bar. All members should be selected by popularly elected officials or by judges nominated and confirmed by such officials. The democratic legitimacy of a nominating commission is especially important in Missouri Plan states because these states fail to offset the commission's power with confirmation of judges by the senate or other popularly elected body.

B. Judges Are Lawmakers, Not Just Technicians

So what if the Missouri Plan lacks democratic legitimacy? While the politicians in the legislative and executive branches should be democratically elected, judges are not supposed to be politicians, are they? Judges, advocates of the Missouri Plan argue, should be selected on their professional merit, not their political popularity.[52]

The problem with this view is that it rests on a one-sided view of the role of a judge. It emphasizes the judge's role as legal technician at the expense of the judge's role as lawmaker. Of course, judging does involve the narrow, lawyerly task of applying to the facts of a case the law made by someone other than the judge (e.g., a legislature). But judging also involves the exercise of discretion. Within the bounds of this discretion, the judge makes law.

This point is not new or controversial. Our common law system – going back centuries to England – rests on judge-made law.[53] And judges do not

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51. *Id.* at 154.

52. *See, e.g.*, Honorable Jay A. Daugherty, *The Missouri Non-Partisan Court Plan: A Dinosaur on the Edge of Extinction or a Survivor in a Changing Socio-Legal Environment?*, 62 MO. L. REV. 315, 318-19 (1997) ("The Plan seeks to improve the selection process and promote superior decision making from the bench by emphasizing professional qualifications rather than political influence.").

53. *See, e.g.*, Maimon Schwarzschild, *Keeping It Private*, 44 SAN DIEGO L. REV. 677, 680 (2007) ("For many centuries in England, and well into the twentieth century there and in other English-speaking jurisdictions, the law of tort and contract – the

always *find* the law; sometimes they *make* the law and make it in accord with their own political views. This, of course, is the basic reality exposed by Legal Realism nearly a hundred years ago.[54] And it is virtually impossible to find anybody who disputes it today. That "we are all realists now" is so thoroughly accepted as to be a cliché.[55] "It is a commonplace that law is 'political.'"[56]

So honesty requires defenders of the Missouri Plan to acknowledge frankly that judges are not merely technicians; they are also lawmakers. Just as it is one-sided to denigrate the technical, lawyerly side of judging by claiming that judges are simply "politicians in robes,"[57] it is also one-sided to denigrate the lawmaking side of judging by claiming that the political views of a judge are irrelevant to his or her job as a judge.

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heart of private law – was mostly judge-made common law, with statutes few and far between. Even today, much of the law of tort is common law, and although contract law in the United States is substantially governed by the Uniform Commercial Code, the UCC itself is largely a codification or restatement of common law doctrines and rules."); James E. Herget, *Unearthing The Origins of a Radical Idea: The Case of Legal Indeterminacy*, 39 AM. J. LEGAL HIST. 59, 64 (1995) ("unlike the continental legal tradition, the common law tradition recognized and accepted as authoritative, the proposition that judges make law").

54. *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 169-212 (1992) (legal realism's most important legacy was its challenge to the notion that law has an autonomous role separate from politics); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 274 (1998) ("[T]he program of unmasking law as politics [was] central to American Legal Realism. . . ."); Thomas W. Merrill, *High-Level, "Tenured" Lawyers*, 61 LAW & CONTEMP. PROBS. 83, 88 (1998) ("We live in a post-Legal Realist Age, when most legal commentators take it for granted that law cannot be disentangled from politics and that legal judgment is driven by the political beliefs of the decisionmaker."); Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 886 (2006) ("Now, having for generations bathed in the teachings of Holmes and the Realists, we heed their lessons. We no longer deny the creative and forward-looking aspect of common law decisionmaking, and we routinely brand those who do as 'formalists.' It is thus no longer especially controversial to insist that common law judges make law.").

55. Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 267 (1997).

56. Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1152 (1985).

57. *See, e.g.*, David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869, 1871 (2008) (describing "two popular narratives about the way Supreme Court Justices decide cases: one that treats Justices as neutral and nonpolitical 'umpires,' and another that views Justices as pervasively ideological 'politicians' in robes."); Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1419 (2003) (referring "to the cynical view that judges are merely 'Politicians in Judges' Robes'").

Furthermore, the political/lawmaking side of judging is especially important for state supreme court justices because they are the final word on their state constitutions and common law.[58] Accordingly, the case for democracy in judicial selection is at its strongest (and the case for elitism at its weakest) when the judges in question are supreme court justices because justices' lawmaking powers far exceed those of the "professional technicians who sit on lower courts."[59] As Professor Paul Carrington explains, so-called "merit selection" of judges

> was popular in numerous states in the twentieth century, but *in its application to courts of last resort* it is linked to a vision of judicial office that is technocratic and apolitical. Although there was a time in the late nineteenth and early twentieth centuries when many American lawyers and some citizens deluded themselves with the belief that judges could be trained to be professional technicians interpreting statutes and constitutions without regard to their political consequences, there is virtually no one who thinks that today.[60]

Similarly, Professor Michael Dimino concludes,

> Public involvement in the staffing of high courts is beneficial from a democratic perspective because of the greater discretion and policy-making authority exercised by high courts. Lower courts, by contrast, are more often bound by settled law, and the judges on such courts do not make policy to the extent that other courts do. As a result, there is less need for public involvement in the selection of lower-court judges, and such involvement may well be a negative influence if it encourages those judges to depart from the application of settled law.[61]

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58. Republican Party of Minn. v. White, 536 U.S. 765, 784 (2002) ("Not only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well.").

59. Paul D. Carrington & Adam R. Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30 CAP. U. L. REV. 455, 469 (2002).

60. *Id.* (emphasis added) (footnote omitted).

61. Dimino, *supra* note 2, at 451-52. *See also* Nagle, *supra* note 3 at 511 ("Perhaps, then, different judges should be chosen in different ways. Judges who decide cases that lack interest to the People could be chosen by simple executive appointment or merit selection; judges who rule on the most controversial questions affecting social policy could be elected or appointed by the executive with legislative confirmation designed to probe judicial philosophy."); G. Alan Tarr, *Designing an Appointive System: The Key Issues*, 34 FORDHAM URB. L.J. 291, 299 & n.42 (2007) ("In most civil law countries in Europe, the judiciary is a career service, akin to the American civil service system. . . . Competitive examinations are used to banish political con-

So the case for democracy is strongest (and the case for elitism weakest) with respect to supreme court justices because the political/lawmaking side of judging is especially important at the supreme court level.

For this reason, the Missouri Plan should not be used to select a state's highest court. In Missouri Plan states, the nominating commission is crucial, and, in selecting that commission, a member of the bar has more power than a fellow citizen who is not a lawyer. This elitism of the Missouri Plan may be somewhat defensible in the context of trial courts. But at the supreme court level, the Missouri Plan's unequal power between a member of the bar and one of her fellow citizens is not acceptable in a democracy. With respect to judges who have the political power of a state supreme court justice, a system that counts a lawyer's vote significantly more than her neighbor's vote simply lacks democratic legitimacy.

C. Retention Elections and Democratic Legitimacy

When confronted with the Missouri Plan's lack of democratic legitimacy, lawyers defending this elitist selection system often assert that it is offset by the popular elections used to retain sitting judges.[62] In other words, advo-

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siderations and personal favoritism from the selection process . . . . Yet even these countries use an overtly political process in selecting the members of their constitutional courts."). While research has not revealed anyone contending that high court judges have less policymaking discretion than lower court judges, some people do minimize the policymaking discretion of judges generally. *See* Bert Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229, 1233 (2008) ("'Judges, except in a very limited sense, do not establish policy.'" (quoting James G. Exum, *Judicial Selection in North Carolina*, 35 N.C. ST. B.Q. 4, 8 (1988))). However, one of these authors, Bert Brandenburg, wrote elsewhere:

> America's courts are under fire. At both the federal and state levels, the influence of tort "reformers" and other special interests threatens the courts' independence. Groups like the U.S. Chamber of Commerce and the American Tort Reform Association are targeting the judges who uphold our laws and protect our rights.

Bert Brandenburg, *Keep the Courts Free and Fair*, TRIAL, July 2004, at 32, 32. Are these two views endorsed by Brandenburg consistent? If judges "do not establish policy" in, say, the common-law field of torts, then why are these interest groups "targeting" them?

62. *See, e.g.*, Daugherty, *supra* note 52, at 319 ("advocates maintain that the merit selection process provides the following benefits: . . . judges are removed from politics, emphasizing professional qualifications rather than political influence . . . retention elections provide for democratic participation"); Robert C. Casad, *A Comment on "Selection to the Kansas Supreme Court,"* 17 KAN. J.L. & PUB. POL'Y 424, 427 (2008) ("In Kansas, our judges have fixed terms of office. The judges of the supreme court and courts of appeals must face retention elections periodically. Their 'accountability' is thus publicly tested directly before the people. Since we cannot provide the kind of independence protections that federal judges enjoy, we have to

cates of the Missouri Plan portray it as a mix of elitism (which they would call "professional merit") at the initial selection stage and democratic legitimacy at the retention stage.[63] This argument, however, vastly overstates the degree of democratic legitimacy provided by retention elections. In fact, retention elections are largely toothless and thus rarely provide significant democratic legitimacy.

The retention elections used in Missouri Plan states are unusual in that the sitting judge does not face an opposing candidate; instead, the voters choose simply to retain or reject that particular judge.[64] For this and other reasons, retention elections are nearly always rubber stamps.

Data on retention elections around the country (as summarized by Professor Brian Fitzpatrick) indicate that sitting judges win retention 98.9% of the time,[65] while – in stark contrast – incumbent supreme court justices running for reelection in states that use partisan elections win only 78% of the time.[66] This rubber-stamp aspect of retention elections is intentional. As Professor Charles Geyh puts it, "[I]t is somewhat disingenuous to say that merit selection systems preserve the right to vote. Retention elections are designed to minimize the risk of non-retention, by stripping elections of features that might inspire voters to become interested enough to oust incumbents."[67] Professor Michael Dimino explains:

> [R]etention elections protect incumbency in multiple, related ways: They minimize the incentives for opposing forces to wage antiretention campaigns by preventing any individual from opposing the incumbent directly; they eliminate indications of partisanship that allow voters to translate their policy preferences cost-effectively into votes; and they increase voter fears of uncertainty by forcing a choice of retaining or rejecting the incumbent before the voter knows the names of potential replacements.[68]

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take steps to provide some measure of independence from partisan politics at the nomination level.").

63. *See* sources cited *supra* note 62.

64. *See supra* note 43. *See also* Ware, *supra* note 2, at 407.

65. *See* Brian T. Fitzpatrick, *Election as Appointment: The Tennessee Plan Reconsidered*, 75 TENN. L. REV. 473, 495 (2008) ("Even that incredibly high number is misleading, however, because over half of the defeats were from Illinois, a state that requires judges to win 60% of the vote rather than a mere majority (as do Tennessee and most other states) in order to stay on the bench. Removing the Illinois defeats from the data where the judges won more than 50% but less than 60% of the vote yields a retention rate of 99.5%.") (footnotes omitted).

66. *Id.* at 496 & n.192.

67. Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 55 (2003).

68. Dimino, *supra* note 39, at 807-08.

Dimino concludes that "retention elections seek to have the benefit of appearing to involve the public, but in actuality function as a way of blessing the appointed judge with a false aura of electoral legitimacy."[69] In other words, retention elections are something of a fraud.[70] They create a false veneer of democracy at the judicial retention stage that the bar can use to distract the populace from the elitism of bar power at the initial selection stage, which is where the real action is.[71]

That said, retention elections are not always toothless. On rare occasions, a judge loses one. So retention elections do provide some (however small) measure of democratic legitimacy. Unfortunately, they do this at the judicial retention stage, when it does the most harm to judicial independence. A wide array of scholars and other commentators agree that "the primary threat to [judicial] independence arises at the point of re-selection, when judges are put at risk of losing their jobs for unpopular decisions that they previously made."[72] This problem is especially acute when a few of the judge's decisions, although well-reasoned in a technical, lawyerly sense, are easy to caricature in a "sound bite" television ad.[73] Accordingly, as Professor Dimino says,

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69. *Id.* at 811.

70. *See* Fitzpatrick, *supra* note 65, at 495 ("[T]he architects of merit selection came up with what some scholars have concluded was a 'sop' to the public: the retention referendum. That is, the retention referendum was designed to make the public feel as though they had a role in selecting their judges but make it unlikely they would exercise that role by voting a judge off the bench.") (footnotes omitted).

71. For example, an op-ed by former Kansas Bar Association President Linda Parks refers to my mention of the federal system of judicial selection and retention as follows: "Ware mentions the option of changing the system by taking the retention vote away from the citizens and instead giving the power to decide the qualifications of the justices to politicians. More power to politicians? That's not what most Kansas citizens support." Linda Parks, Op-Ed, *Keep Selecting Justices on Merit, Not Politics*, THE WICHITA EAGLE, Dec. 6, 2007, at 7A.

72. *See* Geyh, *supra* note 2, at 1276.

73. *See* Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 650 (1999) ("[In retention elections,] voters have removed from the bench several judges after high-profile campaigns focusing on the judge's votes on a single issue, often the death penalty."); Shepherd, *supra* note 2, at 644 (citing examples); Jackson, *supra* note 16, at 133-34 ("Justice White's experience shows a danger of the commission system that should be addressed: the possibility that one decision, because of unfortunate timing or a highly coordinated special interest attack, could cause a judge to lose her position."); Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1099 (2007) ("California's Justice Kaus memorably described the dilemma of deciding controversial cases while facing a retention election, comparing it to 'finding a crocodile in your bathtub when you go in to shave in the morning. You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving.'") (quoting Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the*

> [J]udicial terms of office should be long and non-renewable, such that there are neither reelections nor reappointments. Where judges know that their ability to stay in office depends on how politicians or voters view their decisions, there is the potential for decisions to be made on the basis of those political calculations rather than on the merits.[74]

In sum, retention elections, like other forms of judicial re-selection, do not protect judicial independence.

The Missouri Plan and its retention elections may be the worst of both worlds. While contestable elections threaten judicial independence (especially at the retention stage),[75] contestable elections at least have the virtue of conferring significant democratic legitimacy on the judiciary.[76] By contrast, retention elections also threaten judicial independence but do so without the upside of conferring significant democratic legitimacy on the judiciary. So the Missouri Plan initially selects judges in a manner more elitist than democratic and then brings in a sliver of democratic legitimacy at the retention stage, precisely when it does the most harm to judicial independence. By contrast, the best of both worlds can be attained with a more democratic (less elitist) method of initially selecting judges followed by terms of office that are long and non-renewable. Such a system avoids the elitism of the Missouri Plan while best preserving judicial independence.

III. CONCLUSION

Thoughtful scholars like Professors Carrington and Dimino agree that the case for elitism is stronger with respect to the selection of lower-court judges than supreme court justices, and, conversely, the case for democratic accountability is stronger with respect to the selection of supreme court justices than lower-court judges. So far, so good.

But does democratic accountability of supreme court justices have to mean contestable judicial elections? The arguments against using elections for the initial selection of judges are strong.[77] The arguments against subject-

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Independence of State Supreme Courts in an Era of Judicial Politicization, 72 NOTRE DAME L. REV. 1133, 1133 (1997)).

74. Dimino, *supra* note 2, at 451.

75. *Id.* at 457.

76. *Id.* at 459-60.

77. They begin with the arguments against direct democracy, generally, in favor of a system of indirect democracy – such as that adopted by the Framers of the U.S. Constitution – in which the structure of government mediates and cools the momentary passions of popular majorities. *See* THE FEDERALIST NO. 10, at 49-52 (James Madison) (Clinton Rossiter ed. 1999) (for Madison's classic distinction between republics and democracies). The arguments against direct democracy are especially strong with respect to the judicial branch because

ing sitting judges to any sort of re-election – including the retention elections used by the Missouri Plan – are even stronger.[78] So we ought to seek a way to achieve democratic accountability of supreme court justices without judicial elections. Fortunately, the U.S. Constitution does exactly that.[79] Executive nomination followed by senate confirmation makes judicial selection indirectly accountable to the people without using judicial elections. And giving judges life tenure (or a single, nonrenewable term) preserves this indirect accountability over time without the need for retention (or other) elections.

While Professor Carrington concludes that "judicial elections are here to stay,"[80] and Professor Dimino advocates contestable elections to select (but not retain) state supreme court justices,[81] I encourage reformers of all stripes to reconsider the U.S. Constitution as a model for the selection and retention of state supreme court justices.[82] A state can select its justices through a se-

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> [j]udicial candidates receive [campaign] money from lawyers and litigants appearing in their courts; rarely are there contributions from any other source. Even when the amounts are relatively small, the contributions look a little like bribes or shake-downs related to the outcomes of past or future lawsuits. A fundamental difference exists between judicial and legislative offices in this respect because judges decide the rights and duties of individuals even when they are making policy; hence any connection between a judge and a person appearing in his or her court is a potential source of mistrust.

Carrington, *supra* note 3, at 91-92. *See also* Ware, *supra* note 2 ("The possibility of contributors 'buying justice' in individual cases is the primary concern about judicial elections."). Other concerns about judicial elections include "the reduced perception of impartiality caused by statements of judicial candidates on political or social issues, the elimination of qualified lawyers who would otherwise be willing to serve as jurists, and the loss of public confidence caused by the vile rhetoric of judicial campaigns." Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 276 (2002). Each of these concerns is reduced, if not eliminated, by a senate confirmation system.

78. *See supra* notes 72-76 and accompanying text.

79. *See* U.S. CONST. art. II, § 2, cl. 2.

80. Carrington, *supra* note 3, at 107. *Accord* Geyh, *supra* note 67, at 55 ("The presence of retention elections in merit selection systems can only be explained as a concession to the entrenched political necessity of preserving judicial elections in some form, so that merit selection proponents have an answer for detractors who oppose plans that 'take away our right to vote.'").

81. Dimino, *supra* note 2.

82. I am not the first to make this suggestion. *See* Carrington, *supra* note 3, at 114 ("The best of the various unsatisfactory ways of selecting high court judges is probably that prescribed in the Constitution of the United States."); Tarr, *supra* note 61, at 306 ("[I]t is hard to see why only a few states have embraced the federal model. The sterling reputation of judges selected for the federal courts, taken as a whole, and the national reputations of the California and New Jersey judiciaries indicate that it is

nate-confirmation system and thus follow, albeit indirectly, the democratic principle of one-person-one-vote. Several senate-confirmation states even use a nominating commission without moving much, if at all, from this democratic principle toward elitism.[83] These states manage to be democratic without being populist. They are examples for reformers who seek to avoid both the populism of contestable judicial elections and the elitism of the Missouri Plan.

certainly possible to recruit highly qualified jurists using the federal model. The model of a governor-senate appointment process, with or without the participation of a nominating commission, deserves serious consideration.").

83. *See infra* notes 26-29 (New York, Connecticut, Rhode Island, Utah) & 32 (Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey).

Table 1
Bar Control of Supreme Court Selection

More Elitist, High Bar Control							More Popu-list, Low Bar Control
"Hard" MO Plan, majority of comm'n selected by bar	"Hard" MO Plan, near majority of comm'n selected by bar	"Soft" MO Plan, subordinate role for bar in selecting comm'n	"Senate" Confirm., bar selects some of comm'n	"Senate" Confirm., "lawyers' quota" on comm'n	"Senate" Confirm., comm'n does not restrict Gov.	"Senate" Confirm., comm'n w/o special power for bar	Legis. Appt.	Contest-able Elections
KS	AK IN IA MO OK NE SD WY	AZ CO FL TN	HI VT	NY CT RI UT	CA DE ME MD NH NJ	MA	SC VA	22 states

Alaska's Constitution

A Citizen's Guide

Gordon Harrison

Alaska Legislative Affairs Agency

FIFTH EDITION

ARTICLE IV

THE JUDICIARY

Alaska's judiciary article, like the legislative and executive articles, is short, flexible and incorporates modern constitutional concepts. It creates a unified court system with centralized administration; it provides for merit selection of judges; it balances the need for judicial independence with the need for judicial accountability to the people; and it allows the legislature to expand the court system to keep pace with a growing state.

Alaska's court system is efficient when compared to many others because it is unified. This means that all of the courts are part of a single state system. They are administered from one place, they all operate under the same rules, and they are all financed by the state legislature. We recognize this type of organization in the federal courts. Indeed, Alaska's judicial experience until statehood in 1959 was with the federal court system. In many states, the court system is fragmented into municipal courts, courts of special jurisdictions, county courts and state appellate courts, each with its own peculiar jurisdiction, its own rules and procedures, its own administration and its own source of funding. Also, in many states, legislative power to create new courts or modify the jurisdiction of constitutional courts is restricted or ambiguous. Judicial reforms long sought in these older states are embodied in Alaska's constitution.

Alaska's system of merit selection for judges seeks to produce a competent and independent judiciary. Article IV requires that judges be appointed by the governor from a list of nominees recommended by an independent body, the judicial council, described in Section 8 below. Thus, judgeships are not spoils of office. Also, judges are not elected. The convention delegates had no confidence in the electoral process to produce qualified judges. Appointed judges do not need to worry about how their decisions will affect their immediate chances of re-election, nor do they need to finance expensive campaigns from donations by private interests (including attorneys who appear before them).

Accountability of appointed judges to the people is provided by periodic "retention elections" in which judges stand before the electorate on their own records, without party labels. The question before the voters is simply whether a particular judge should remain in office. Retention elections for a judge occur at the first general election three years after the judge is appointed (except in the case of district court judges, where it is the first general election one year after appointment) and at four, six, eight, and ten-year intervals thereafter, depending on the court level. A judge can be impeached by

the legislature for "malfeasance or misfeasance" in the performance of duties. A judge can be removed from the bench by the supreme court, after a review by the council on judicial conduct, for mental or physical incapacitation or breach of ethics. However, a judge may not be recalled by the voters (see Article XI, Section 8).

Article IV is flexible because it specifies only the rudimentary structure of the court system and gives the legislature wide latitude to expand and shape the system to meet the needs of the state. The delegates created only two constitutional courts—the superior court (a trial court of general jurisdiction) and the supreme court (an appellate court). Unlike the supreme court, which is a single body with all of the justices sitting together to hear cases, the superior court has many judges in each of the four judicial districts of the state who hear cases sitting alone. At the time, a more elaborate (and more costly) structure was unnecessary. Yet the delegates anticipated the future by authorizing the legislature to expand the court system by adding judges and creating new courts.

These progressive features of Article IV, notably the unified court system and merit selection of judges, did not debut with the Alaska constitution. New Jersey pioneered the unified court system in its 1947 constitution, and Missouri initiated the merit selection of judges in its 1946 constitution. Yet Alaska's judiciary article is notable because it incorporated so many of the innovations hailed by constitutional reformers of the day. Many states have embraced these judiciary reforms in the years since Alaska's constitution was written.

Article IV has been amended five times, but only for fine-tuning. The basic features of the article have proven workable and remain unaltered. Today, Alaska's judiciary system is recognized nationally as one of the best in the United States.

Section 1. Judicial Power and Jurisdiction

> **The judicial power of the State is vested in a supreme court, a superior court and the courts established by the legislature. The jurisdiction of courts shall be prescribed by law. The courts shall constitute a unified judicial system for operation and administration. Judicial districts shall be established by law.**

This section vests the judicial power of the state in the court system and creates the basic structure of that system. It consists of the superior court, which is a trial court, and the supreme court, which hears appeals from the trial court. This section also authorizes the legislature to create additional courts. The legislature has created the district court, which is another trial court that relieves the superior court of hearing lesser criminal and civil matters. It has also created the court of appeals for criminal cases, an intermediate appellate court that helps reduce the number of criminal appeals reaching the supreme court. Alaska's constitution gives to the legislature the task of prescribing the jurisdiction of the various courts, and in this respect it is not unusual, except perhaps in the clarity of its directive.

Importantly, this section also specifies that Alaska's court system is to be unified. Thus, any courts the legislature may create must be administered by the supreme court as part of a centralized state judicial system.

Judicial districts are commonly established in constitutions, but the delegates preferred to leave this matter to the legislature so districts could be easily modified from time to time with changing administrative needs of the judicial system. During territorial days, the federal courts were organized in four judicial districts—District One, southeast Alaska; District Two, northwest Alaska; District Three, southcentral Alaska; and District Four, interior Alaska. The legislature has adopted these four districts for the organization of the state judicial system (see AS 22.10.010 for the boundaries of each district).

The Alaska Supreme Court has declared that this section confers upon it certain inherent rule-making authority distinct from the rule-making authority granted in Section 15. It has said, for example, that it has exclusive power to regulate the practice of law in the state, and statutes dealing with this subject are an unconstitutional invasion of the judicial branch of government (see for example, *Citizens Coalition for Tort Reform v. McAlpine*, 810 P.2d 162, 1991.)

Section 2. Supreme Court

> **(a) The supreme court shall be the highest court of the State, with final appellate jurisdiction. It shall consist of three justices, one of whom is chief justice. The number of justices may be increased by law upon the request of the supreme court.**
>
> **(b) The chief justice shall be selected from among the justices of the supreme court by a majority vote of the justices. His term of office as chief justice is three years. A justice may serve more than one term as chief justice but he may not serve consecutive terms in that office**

Paragraph (a) of this section creates the "court of last resort" in the state judicial system. It sets the number of supreme court justices at three, but allows the legislature to increase that number "upon the request of the supreme court." This proviso (modeled on a similar proviso in Puerto Rico's constitution) was included to prevent the legislature from "packing" the supreme court with new justices as a means of changing a prevailing interpretation of the law. At the request of the court, the legislature expanded the number of justices to five in 1967 (16 other state supreme courts have five justices, 26 have seven justices, and seven have nine justices).

Paragraph (b) was added by amendment in 1970. Notice that paragraph (a) is silent on how the chief justice is to be selected. Prior to the 1970 amendment, the governor designated the chief justice. The

change followed a bitter conflict during the late 1960s between the court and the state bar association over the chief justice's exercise of his administrative prerogatives. The amendment was designed to prevent the accumulation of excessive power by one justice and to make the chief justice accountable to the other members of the court.

This section is, comparatively speaking, simple and terse. Absent are a number of provisions found in other constitutions pertaining to the supreme court, such as authorization to render advisory opinions at the request of the governor or legislature; a requirement for a supermajority vote to declare a legislative act unconstitutional; formal authorization to exercise the power of judicial review (i.e., to scrutinize the constitutionality of acts of the other branches of government); permission for "divisions" of the court (panels of fewer justices than the full bench) to hear and render decisions on cases; assignment of original jurisdiction to the court in certain cases (legislative redistricting cases, for example); or a requirement for broad geographical representation on the court.

Section 3. Superior Court

> **The superior court shall be the trial court of general jurisdiction and shall consist of five judges. The number of judges may be changed by law.**

The superior court is the trial court with original jurisdiction over all civil and criminal matters. To facilitate the work of the court, particularly in small communities without a superior court judge, the legislature immediately after statehood established a set of lower trial courts called district magistrate courts. Deputy magistrates were authorized to assist district magistrates by serving primarily in outlying areas. In 1966, the magistrate courts became the district courts of the present day, and deputy district magistrates became today's magistrates. (The history of the district court and the role of magistrates are discussed in *Buckalew v. Holloway,* 604 P.2d 240, 1979.) Thus, there are now two trial courts, the superior court and the district court.

The superior court deals with serious criminal offenses (felonies) and civil cases involving claims for recovery of money or damages in excess of $100,000. It hears cases on appeal from the district court, and it handles family and juvenile matters. The district court hears minor criminal cases (misdemeanors), violations of municipal ordinances, and civil cases involving sums less than $100,000. Magistrates are appointed by and serve at the pleasure of the presiding superior court judge in each district. They assist primarily, but not exclusively, in outlying areas with routine district court matters such as issuing marriage licenses, summons, and search and arrest warrants; setting bail; and solemnizing marriages.

Each superior and district court judge, and each magistrate, is assigned to one of the four judicial districts. One superior court judge in each district is designated presiding judge to coordinate

administrative matters. There are 40 superior court judgeships throughout Alaska, and 21 district court judgeships (2012).

Section 4. Qualifications of Justices and Judges

> **Supreme court justices and superior court judges shall be citizens of the United States and of the State, licensed to practice law in the State, and possessing any additional qualifications prescribed by law. Judges of other courts shall be selected in a manner, for terms, and with qualifications prescribed by law.**

The legislature has required that, in addition to meeting these minimum qualifications, supreme court justices and superior court judges must have been residents of the state for three years immediately preceding their appointment and engaged in the active practice of law for eight and five years respectively prior to their appointment (AS 22.05.070 and AS 22.10.090). Court of appeals and district court judges must meet the same minimum qualifications and must have been in the active practice of law for eight and three years, respectively (AS 22.07.040 and AS 22.15.160(a)). Magistrates, however, do not have to be licensed lawyers, and they need to be residents of the state only six months prior to being appointed (AS 22.15.160(b)).

Section 5. Nomination and Appointment

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

A variety of methods are used to select judges in the states. Indeed, a variety of methods may be used to select judges of the different courts within the same state. Some judges are elected by the voters on either a partisan or nonpartisan basis; others are appointed, either by the legislature, the judiciary or, more commonly, the governor. The trend is toward appointment as a method of selection, coupled with the use of an impartial body that screens applicants on the basis of their qualifications. In Alaska, this screening body is titled the judicial council. The judicial council evaluates candidates for judgeships and submits several nominees to the governor who makes the final appointment. In other states, the legislature may confirm the governor's appointments. (In Connecticut, the legislature does the appointing from the list of nominees, and in California appellate court judges are appointed by the governor and confirmed by the commission on judicial appointment.)

Alaska was one of the early states to adopt this merit selection method of appointment by the governor from a list of nominees submitted by an independent body which evaluates the qualification of applicants. When a judicial vacancy occurs, the Alaska Judicial Council receives applications from

those interested in filling the position. It then evaluates the candidates on the basis of information derived from a poll of the bar association, letters of reference, background investigations, public hearings and interviews. The council must forward at least two names to the governor; frequently it sends more than two (on one occasion it sent nine names to the governor for a single vacancy).

The legislature has provided for judgeships in the two statutory courts (the district court and court of appeals) to be filled by this method too, although the constitution does not require it (AS 22.07.070 and AS 22.15.170). The legislature has also directed the judicial council to evaluate candidates for the state public defender's office (AS 18.85.050). Composition of the judicial council is specified in Section 8 of this article, and other duties are assigned to it in Section 9.

Section 6. Approval or Rejection

> **Each supreme court justice and superior court judge shall, in the manner provided by law, be subject to approval or rejection on a nonpartisan ballot at the first general election held more than three years after his appointment. Thereafter, each supreme court justice shall be subject to approval or rejection in a like manner every tenth year, and each superior court judge, every sixth year.**

The merit selection method of filling judgeships is usually coupled with the retention election procedure outlined here. Under this procedure, the voters may remove a judge they believe is unfit for office, but, because the judge's name appears on the ballot only at certain intervals, it does not allow them to sweep away a judge on a sudden whim or impulse, and it gives a new judge time to establish a record which can be fairly evaluated. Thus, the retention election is designed to balance the need for judicial independence with the need for public accountability.

Only rarely are judges rejected at the polls (five as of 2010), and the vote in favor of retention is usually between 60 and 75 percent of the total. This is evidence of the generally high caliber of Alaska's judges. It must be noted, however, that the form of the retention elections tends to encourage a yes vote: there is no opposing candidate to the judge standing for election; the judge is nonpartisan; and he or she has the advantage of already being in office.

Recognizing that the public may have difficulty assessing a judge's performance, and mindful of the vulnerability of judges to last-minute smear campaigns, the legislature in 1975 directed the judicial council to evaluate judges standing for retention election and publish the results prior to the election. Several judges have been retained by the voters despite being deemed unqualified by the judicial council, but those rejected by the voters after 1975 had all been deemed unqualified by the council. Prior to the judicial council making recommendations on retention, one judge was rejected by the

voters—a supreme court justice in 1964. The process used by the council since 1975 to evaluate judges is described in the commentary on Section 9.

By statute, judges of the district court and court of appeals are also evaluated by the judicial council prior to their retention election. Only supreme court justices and judges of the court of appeals stand for retention on a statewide basis. Superior and district court judges stand in the judicial district they serve.

The date of a judge's "appointment" is the day the governor makes the appointment rather than the day the judge is installed in office. (See *State, Division of Elections v. Johnstone,* 669 P.2d 537, 1983.)

Section 7. Vacancy

> **The office of any supreme court justice or superior court judge becomes vacant ninety days after the election at which he is rejected by a majority of those voting on the question, or for which he fails to file his declaration of candidacy to succeed himself.**

This section is intended to give a judge leaving office sufficient time to wind up judicial business in an orderly manner and to minimize transition time by allowing the process for appointing a successor to commence in advance of the vacancy.

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 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.**

Among the states with an independent commission for nominating candidates for judgeships, Alaska is unusual because it has only one such body with responsibility for all appellate and trial courts in the state. In other states, each judicial district is likely to have its own nominating commission for judges who serve that district, and a separate statewide commission that nominates candidates exclusively for statewide appellate court vacancies. While Alaska has only one judicial council for all courts and all districts, its members are to be appointed "with due consideration to area representation."

The composition of the Alaska judicial council—seven members, three of whom are attorneys and three of whom are not attorneys, with the chief justice an ex-officio member and chairman—is similar to that of the statewide commissions in other states. However, in other states the balance is likely to be in favor of lay members rather than lawyers (in Hawaii and Arizona, for example, no more than four of the nine members may be attorneys). Also in other states, all appointees require legislative confirmation; in Alaska, only the lay members appointed by the governor must be confirmed. The privileged role of the state bar association in selecting members of the council, and therefore members of the judiciary, was challenged unsuccessfully in 2009 in federal court as a violation of the U.S. Constitution.

To emphasize the nonpartisan character of the judicial council, this section requires that appointments be made "without regard to political affiliation," although this seems to be a standard that would be difficult to enforce.

The prohibition against "dual office holding" is to avoid conflicts of interest on the part of members (see the commentary under Article II, Section 5).

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.**

The primary constitutional duty of the judicial council is to screen applicants for supreme court and superior court vacancies and nominate qualified candidates for appointment by the governor (Section 5). This section gives it the additional duty of studying the judicial system and recommending improvements. Thus, for example, the judicial council has studied such matters as plea-bargaining, bail, sentencing, and use of the grand jury. These studies and recommendations are described in the biennial reports to the legislature and supreme court required by this section.

In addition, this section authorizes the legislature to assign other tasks to the judicial council. The legislature has charged the council with the task of screening applicants for vacancies in the district

court and court of appeals, as well as applicants for the state public defender's office. The main duty assigned to the council by the legislature, however, is that of publicly evaluating the performance of judges prior to their retention elections. (Retention elections are required by Section 6, above.)

To evaluate the fitness of judges for retention, the council surveys attorneys, police officers, probation officers, jurors, social workers, and court employees; it studies decisions of the judge and pertinent court records; and it solicits citizens' opinions through public hearings and other means. The council must publicize the results of its evaluations at least 60 days before the retention election. It does so by publishing them in newspapers around the state and in the official election pamphlet distributed to voters by the division of elections.

At the request of the supreme court, the judicial council also evaluates the performance of *pro tempore* judges (retired judges working under special assignments from the supreme court).

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.**

The purpose of this section is to provide an alternative to impeachment for removing a judge from the bench. Impeachment is a cumbersome process; furthermore, it is available only in the case of "malfeasance or misfeasance," which must be proved. It has taken two amendments to this section, however, to develop a satisfactory mechanism for removing or disciplining a judge.

Originally, this section set out a procedure for removing a judge for being incapacitated but not for misconduct. According to the original procedure, the judicial council could certify to the governor that a supreme court justice was incapacitated, whereupon the governor would appoint a three-member board to review the matter and decide whether to recommend to the governor that the justice

should be removed from office. With regard to judges of other courts, the judicial council could recommend early retirement to the supreme court, which was authorized to force a judge into retirement. This provision was similar to one in the 1950 Hawaii constitution.

On one occasion (in 1962), the judicial council used the original procedure to remove a judge. It became apparent, however, that the issues of judicial ethics and propriety were a greater threat to the integrity and public esteem of the judiciary than the infrequent problem of a mentally or physically impaired judge who refused to resign. Thus, the judicial council recommended that the legislature establish a separate commission with broad authority to investigate allegations of judicial misconduct, as well as incapacity, and to recommend disciplinary action. Council members had studied the California commission on judicial performance as a model for such a body. The council's recommendation led to a constitutional amendment in 1968 that created a nine-member commission on judicial qualifications.

In 1982, a second amendment changed the name of the body to the commission on judicial conduct to lessen public confusion about the respective roles of this commission and the judicial council. It also modified the composition of the body by reducing the number of judges from five to three, and increasing the number of lawyers from two to three and lay members from two to three.

The Alaska Commission on Judicial Conduct may investigate charges of disability as well as charges of unethical or improper behavior (such as showing bias or personal favoritism from the bench); it may not evaluate the quality or correctness of judicial decisions, or the general skill and competence of judges. The commission's authority is limited to making recommendations to the supreme court, which independently decides if suspension, censure or removal from office is appropriate (see *In re Robson,* 500 P.2d 657, 1972). Statutory provisions giving the commission authority to reprimand a judge were declared unconstitutional (*In re Inquiry Concerning a Judge,* 762 P.2d 1292, 1988).

As is the case with other boards overseeing professional licensing and standards, relatively few complaints filed with the commission eventually result in a public recommendation for disciplinary action. Nonetheless, the existence of the commission doubtless makes for a more circumspect judiciary.

Section 11. Retirement

> **Justices and judges shall be retired at the age of seventy except as provided in this article. The basis and amount of retirement pay shall be prescribed by law. Retired judges shall render no further service on the bench except for special assignments as provided by court rule.**

Unlike federal judges who are appointed for life (and who do not face periodic retention elections), state judges must retire at age 70. Mandatory retirement of state judges at 70 is common (two-thirds of the states provide for it, either by constitution or statute). It is considered necessary to prevent the possibility of a person of failing powers remaining on the bench, and it creates the opportunity for the infusion of new talent in the judiciary. On the other hand, it deprives the state of the services of experienced judges who remain intellectually vigorous after their seventieth birthday. Thus, after debating the matter, the framers of Alaska's constitution adopted mandatory retirement but left the door open for the supreme court to call on retired judges for ad hoc assignments (so-called *pro tempore* service).

Section 12. Impeachment

> **Impeachment of any justice or judge for malfeasance or misfeasance in the performance of his official duties shall be according to procedure prescribed for civil officers.**

Most constitutions provide for the removal of justices and judges by impeachment. However, it is a cumbersome and archaic procedure that is seldom used. It has not yet been used in Alaska. Therefore, alternative procedures for removal of judges for incapacity or misconduct, such as those found in Section 10, are common (and becoming more so). Judges are not subject to recall in Alaska (Article XI, Section 8). Alaska's impeachment procedure is described in Article II, Section 20.

Section 13. Compensation

> **Justices, judges, and members of the judicial council and the Commission on Judicial Qualifications shall receive compensation as prescribed by law. Compensation of justices and judges shall not be diminished during their terms of office, unless by general law applying to all salaried officers of the State.**

The first sentence in this section was amended in 1968 by adding the words "and the Commission on Judicial Qualifications." The amendment in 1982 that changed the name of the commission on judicial qualifications to the commission on judicial conduct inadvertently omitted express mention of this section, therefore the old name still appears here. Judges and justices receive salaries set by statute. However, the legislature has decided not to compensate members of the judicial council and the commission on judicial conduct for their service on these bodies. They receive only travel expenses and an allowance for living expenses while attending meetings. The prohibition in the second sentence of this section against reducing the salaries of judges in office is a means of safeguarding the independence of the judiciary. This and identical protection for the governor and

lieutenant governor in Article III, Section 15 help protect the integrity of the three branches of government.

Section 14. Restrictions

> **Supreme court justices and superior court judges while holding office may not practice law, hold office in a political party, or hold any other office or position of profit under the United States, the State, or its political subdivisions. Any supreme court justice or superior court judge filing for another elective public office forfeits his judicial position.**

This prohibition on dual office holding serves the same purposes as similar prohibitions that apply to legislators and the governor: it prevents conflicts of interest, concentrations of power and violations of the separation of powers (see Article II, Section 5). The additional prohibition here against holding office in a political party is intended to reinforce the nonpartisan character of the judiciary. Article II, Section 5, which prohibits dual office holding on the part of legislators, exempts employment by or election to a constitutional convention. No such exemptions appear in this section. This provision required a state judge to resign his position as a regent of the University of Alaska (1976 Informal Opinion Attorney General, December 27).

Section 15. Rule-making Power

> **The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.**

By granting the supreme court authority to make administrative and procedural rules, this section promotes the unity and operational efficiency of the entire court system. At the time of Alaska's constitutional convention, the American Bar Association strongly recommended a provision of this kind; and vesting the supreme court with the power to issue rules for all state courts continues to be urged as a desirable constitutional reform in states with balkanized court systems.

While other state constitutions also grant rule-making power to the supreme court, this provision is noteworthy because it allows the legislature to *amend* the rules governing practice and procedure by a two-thirds vote of each house. Florida has a similar provision, but there the legislature may only *repeal* a court rule by a two-thirds vote of each house. This provision is one of the important "checks and balances" of our governmental system, in this case a legislative check on the judicial branch. The

legislature cannot adopt court rules on its own initiative, but only change rules made by the court (the substance of this distinction might be difficult to find in practical circumstances, however). The court has said that adopting a law containing a provision that inadvertently changes a court rule is not a proper exercise of the authority granted to the legislature in this section *(Leege v. Martin,* 379 P.2d 447, 1963).

With the aim of discouraging public interest law suits against the state, the legislature in 2003 adopted a law that exposed public interest litigants to an assessment of the defendant's legal costs in cases when the defendant prevailed in court. This law affected the "public interest exception" to a rule of civil procedure that normally allowed partial costs to be awarded to the prevailing party. Litigation ensued, in which a Native village, several environmental organizations, and some labor unions argued that the legislature did not adopt the measure by a two-thirds majority vote and it was therefore invalid because the constitution requires a supermajority vote to change court rules. Reversing a lower court decision, the Alaska Supreme Court said that the measure changed a matter of substantive law, not procedure, and the legislature needed only a majority vote to do so (*State v. Native Village of Nunapitchuk*, 156 P.3d 389, 2007).

While this section says that court rules governing practice and procedure in both civil and criminal cases may be amended by the legislature by two-thirds vote, there are some basic rules governing the internal working of the courts that are an exercise of the inherent powers of the judicial system as a separate branch of government, and they are therefore presumably not subject to review by the legislature. The court has said that Section 1 of this article confers some exclusive rule-making authority (see, for example, *Application of Park*, 484 P.2d 690, 1971; and *Citizens Coalition for Tort Reform v. McAlpine*, 810 P.2d 162, 1991).

Section 16. Court Administration

> **The chief justice of the supreme court shall be the administrative head of all courts. He may assign judges from one court or division thereof to another for temporary service. The chief justice shall, with the approval of the supreme court, appoint an administrative director to serve at the pleasure of the supreme court and to supervise the administrative operations of the judicial system.**

The first sentence of this section further unifies the court system by centralizing its administration in the chief justice of the supreme court. It follows the 1947 New Jersey Constitution and the recommendation of the *Model State Constitution.* Many states now have comparable provisions. The second sentence allows the chief justice to cope with backlogs, equalize workloads and otherwise expedite the operation of the court system by temporarily assigning judges from one court to another and from one location to another.

Responsibility for day-to-day administration of the court system falls to a professional court administrator who answers to the entire supreme court. Indeed, this was the subject of a 1970 amendment. Originally, the court administrator was hired with the approval of the entire court but served at the pleasure of the chief justice. The 1970 amendment made the administrator responsible to the entire court. The change sought to dilute the power of the chief justice; like the amendment of Section 2, it was an outgrowth of conflicts over the exercise of power by the first chief justice under the original constitutional provisions.

ALASKA JUDICIAL COUNCIL
VOTING STATISTICS – APPLICATIONS FOR JUDICIAL POSITIONS

Six Council Members: three appointed by Bar Association Board of Governors after election, three appointed by the Governor. Chief Justice is ex officio and votes only when the members do not have a four-person consensus.

1984 – 2014: past 30 years [all years for which data is available]

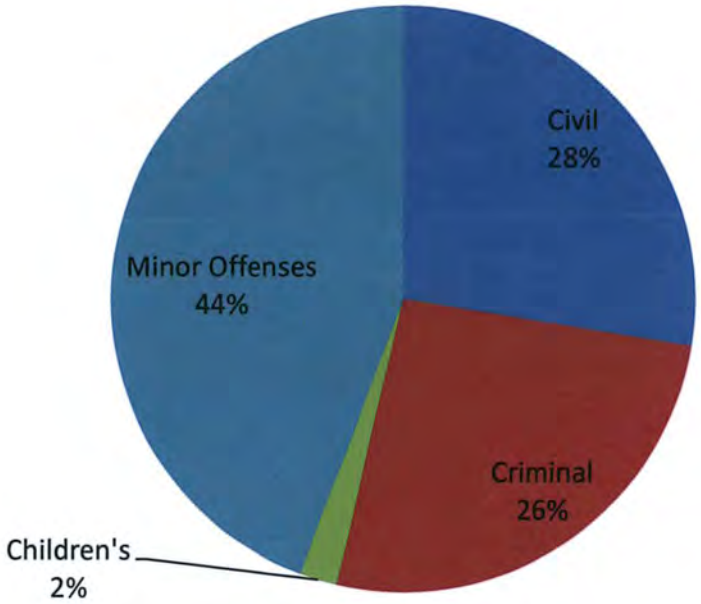
Total votes taken on judicial applicants:	1,149
• Number that were unanimous:	710/1,149 (62%)
• Number that were unanimous or "unanimous except for 1" votes:	932/1,149 (81%)
• Number in which the Chief Justice voted, usually because of a 3-3 tie:	69/1,149 (6%)
▪ Number of those in which CJ voted to send the name to the Governor for consideration:	51/69 (74%)
• **Number in which the vote was tied, with the attorneys and non-attorneys split:**	**16/1,149 (1.4%)**
▪ Number of those 16 splits in which the CJ voted with the attorneys, not with the public members:	11/16 (69% of splits)
Total number of times CJ had to vote, and voted with attorneys:	**11/1,149 (.9%; < 1%)**
▪ Number of those 16 splits in which the CJ voted with the public members, not with the attorneys:	5/16 (31%)
• Number in which the vote was tied, with attorneys and non-attorneys split, and the CJ's vote was with the attorneys not to send the name to the Governor for consideration:	9/1,149 (.8% of total)

2010 – 2014: past five years [subset of above 30-year stats]

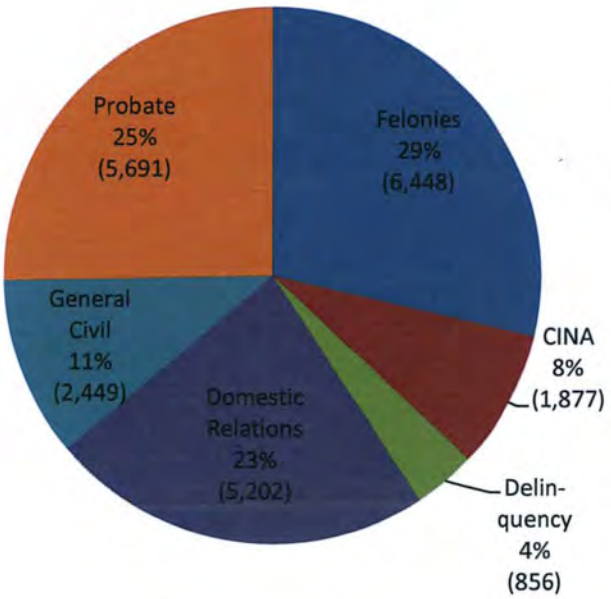
Total votes taken on judicial applicants:	212
• Number that were unanimous:	116/212 (55%)
• Number that were unanimous or "unanimous except for 1" votes:	160/212 (75%)
• Number in which the Chief Justice voted, usually because of a 3-3 tie:	10/212 (4.7%)
• **Number in which the vote was tied, with the attorneys and non-attorneys split:**	**8/212 (3.8%)**
▪ Number of those splits in which the CJ voted with the attorneys, not with the public members:	7/8 (87% of splits)
Total number of times CJ had to vote, and voted with attorneys:	**7/212 (3% of total)**
▪ Number of those splits in which the CJ voted with the public members, not with the attorneys:	1/8 (13%)
• Number in which the vote was tied, with attorneys and non-attorneys split, and the CJ's vote was with the attorneys not to send the name to the Governor :	6/212 (2.8% of total)

FY14 TRIAL COURT CASE FILINGS STATEWIDE

SUPERIOR AND DISTRICT COURTS COMBINED
(132,032 total trial court cases filed in FY14)

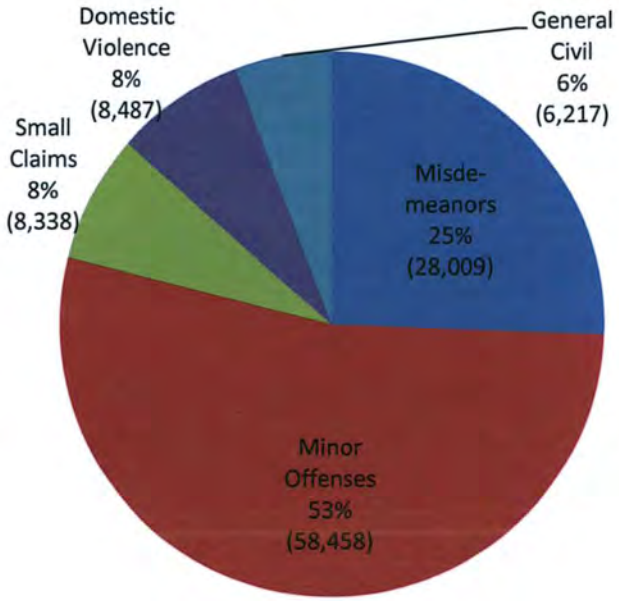


SUPERIOR COURT FILINGS
(42 Judges)
(22,523 superior court cases filed in FY14)



[In addition to 6,448 new felony case filings, superior courts handled 4,640 felony PTRPs in FY14]

DISTRICT COURT FILINGS
(23 Judges & 53 Magistrate Judges)
(109,509 district court cases filed in FY14)



[71% of MO citations statewide were filed electronically]

Prepared by Nancy Meade, General Counsel, Alaska Court System

1-21-15

Alaska Judicial Council

Voting Information

For the Senate State Affairs Committee

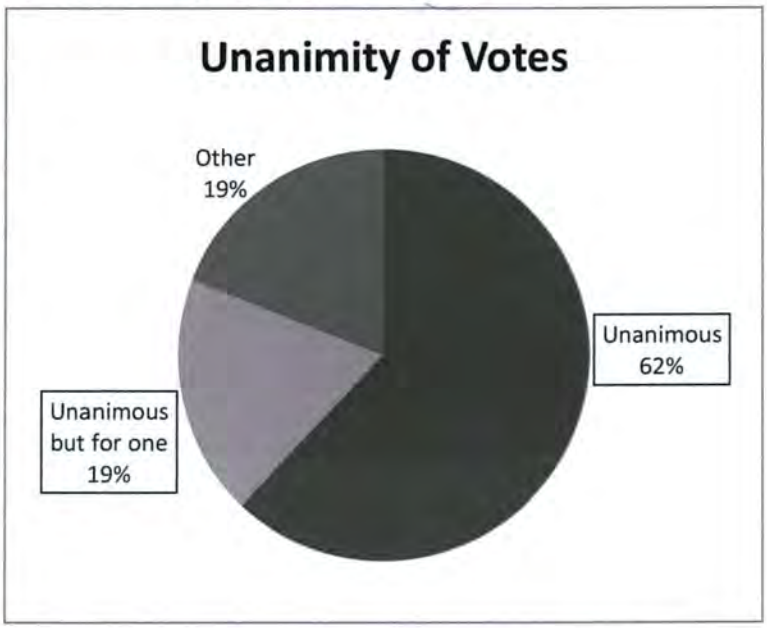
Feb. 18, 2015

Since permanent records have been kept starting in January 1, 1984, members of the Judicial Council have voted on **1,149 applications for judicial nomination**. This fact sheet shows how some of those votes were taken.

• Council members have a high rate of agreement about nomination decisions

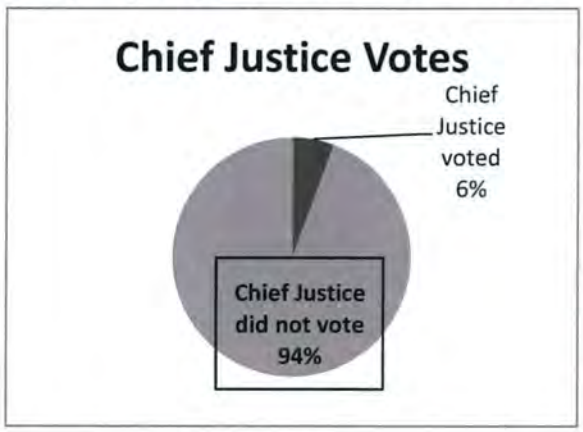
Historically, Council members have been unanimous or nearly so in their choices about which applicants are most qualified. In 81% of all votes taken (N=932), the Council's votes were unanimous or "unanimous except for one."

Of those 932 votes, most were unanimous (62%). In the remainder, (19%) only one person voted differently from the others.



• The Chief Justice rarely votes

Given the Council members' high rate of unanimous voting, it is not surprising that the Chief Justice rarely votes. (The Chief Justice votes only when to do so would change the outcome, usually because of a 3-3 tie). Over the past 30 years, chief justices have voted only 69 times (6% of all votes). Thus, 94% of the time, the chief justice does not vote.



• Attorney/nonattorney vote splits are very rare

On those rare occasions when the Chief Justice is called upon to vote, the reason is most often because some of the attorneys and some of the nonattorneys are together, but no four-vote consensus has emerged. Fifty-three of the 69 chief justice votes occurred where some attorneys were in agreement with some nonattorneys. Thus, only 16 times (out of 1,149) votes involved disagreements about nomination decisions that broke along attorney-nonattorney lines (less than 2% of all votes taken).

- **When called upon to vote, the chief justices usually forward the name in question to the governor.**

  Almost three-quarters of the time (74%), chief justices voted "yes" to forward the name in question to the governor.

  Thus, the chief justices' 69 votes have given governors 51 more nominees than would have been available if the chief justices had not voted.

- **The Council usually forwards more than two names to the governor**

  For most vacancies, the Council nominates more than 2 applicants: About 73% of the time Council members have nominated more than the minimum number of applicants.

  On average, about 37% of all candidates' names are forwarded to the governor.

  Instances in which the Council sends fewer names most often occur on vacancies in small rural areas, where there are not many applicants.

February 18, 2015

Re: Testimony on Senate Joint Resolution 3 — Alaska Judicial Council

Dear Senator Stoltze:

My name is John Harmon. I'm a retired attorney and current high school principal who lives in your district. My family originally moved to Alaska in the 1970's and resides in Palmer. I am proud to be an Alaska citizen and support a merit-based system for selecting judges. However, I have concerns about the potential dangers that can occur in an unchecked merit-based system; political dangers that I believe are ingeniously disguised as falsely promoting an 'independent judiciary'.

I am no stranger to the law or the judicial system. It was my privilege to spend nearly 20 years working in the law. I started my legal career as an attorney for one of the largest law firms in the country and spent most of my legal career working as an Associate General Counsel for a Fortune 500 company. I also had the opportunity to experience the working environment of three different court systems from an 'in-side' perspective, including a county municipal court, a state supreme court, and a federal court.

The current supporters of the Alaska Judicial Council (the "Council") quickly defend the Council as a nonpartisan body that acts with judicial accountability and integrity. I too commend the Council in many of its efforts. I also agree that there are many good judges on the bench. However, where we continue to disagree is the degree to which partisanship is involved in the current process. Organizations such as "Justice Not Politics Alaska" wish to convince Alaskans that the system is void of partisan politics. This is not true and is clearly demonstrated in the most recent retention election of Judge Estelle where the Council treated him differently from other judges who were guilty of similar oversights.

Last fall I wrote an opinion piece sharing my personal concerns about Alaska's system for selecting and retaining judges and recommended ideas to make the system better (attached). The article suggests the system is not perfect, but that with more education about the shortcomings of the system, paired with legislative intervention, Alaska can develop one of the best merit-based systems in the country. Special interest groups who benefit from the current system were quick to criticize my opinions without acknowledging the flaws in the system; and, in essence, praised the fact that Alaska has a system that encourages the appointment of activist judges who are better at understanding legislative intent than the legislature itself.

As the legislature looks for ways to improve the judicial system in Alaska, I recommend the legislature explore the potential dangers of a merit-based system that is void of ethics laws and subjectively selects a limited number of candidates without clear direction. The former Chief Justice of the Michigan Supreme Court wrote an insightful article in the *Harvard Journal of Law & Public Policy* exposing the weakness of a merit-based system dominated by special interests, such as attorneys (attached). Although I don't agree that elections are the answer, he clearly articulates my concerns about the inherent dangers of an uncontrolled merit-based system.

In closing, to improve Alaska's system, I believe the legislature should reign in the Council by enacting an ethics law for the Council, require that the Council send up a diverse group of at least five nominees to the governor for each judicial position, and eliminate the Council's role as a lobbying organization for (or against) judges during retention elections. If Alaskans wish for a truly independent judicial branch that desires justice, not politics, it must act now to reform the embattled Alaska Judicial Council.

Best Regards,

John T. Harmon

John T. Harmon

BA, MS Ed, JD

Judicial Council's conduct troubling

By John Harmon | Posted: Thursday, September 25, 2014 9:37 pm

Judicial Council's conduct troubling

"Absolute power corrupts absolutely."

Unfortunately, this famous quote came to my mind when I thought about Alaska's Judicial Council. The Alaska Constitution established the Council with the intent to conduct studies for improvement of the administration of justice in Alaska and to make recommendations to the Alaska Legislature and Supreme Court. However, over the past decades, we've seen the power of this body expand, as well as its involvement in partisan politics. The Council's role has expanded to be an advocate for or against judges, with no apparent ethics oversight. The Council's conduct is also troubling, as it appears to actively lobby for the nomination and retention of judges it likes and to lobby against judges it would like to replace. To me, based on its most recent actions, the Alaska Judicial Council does not reflect the values of most Alaskans and is no longer a credible body.

Why am I concerned? Let's look at what I believe are the Council's more recent acts of unbridled partisanship in furtherance of a political agenda. In 2010, the Council recommended that a judge who spent time in jail for a second DUI be retained. At the same time, the Council rallied against a judge who received acceptable to excellent scores based on concern of 'constant friction' with other judges.

The same year, the Council recommended for the retention of an activist Alaska Supreme Court justice, ignoring the public concern of many Alaskans. In this case, it took a community organization to advocate against the Alaska Judicial Council's recommendation. The Judicial Council's filings with the Alaska Public Office Commission show that the Judicial Council embarks on advertising sprees to support its recommendations and, in 2012, the Council appeared to use state funds to lobby for the retention of a judge who was under attack by conservative

groups. Alaska promotes its judicial system as 'merit' based, but the actions seen from the Council appear to be those of partisan politics.

So, what is the answer? The first step is to ensure this body is held accountable to the public by an ethics law that covers all members of the Judicial Council and the Council's staff. The second step is to re-evaluate the expanded role of this body – and, return the body to its initial Constitutional borders. There is a delicate balance of power between the three branches of government. However, due to the partisan politics, the Alaska Judicial Council has wandered far off the path envisioned for it by the framers of the Alaska Constitution.

During the last legislative session, Representative Wes Keller introduced a House bill that would curtail the Alaska Judicial Council from engaging in partisan politics and focus it back on the duties provided by the Alaska Constitution. The law would have required the Council to provide impartial and objective information to the public, but not advocate for or against a judge. Although the bill failed to pass the legislature last session, the issue needs to be addressed during the next legislative session — as it will help ensure that 'absolute power' will not corrupt "absolutely."

I am optimistic that the legislature can address the concerns that have plagued the Alaska Judicial Council over recent years. However, until there is change within the Council, Alaskans should do their own research on judicial candidates up for retention and take the recommendations of the Alaska Judicial Council for what they appear to be — elitist partisan opinions with the apparent goal of removing more conservative judges from the bench and retaining the more liberal judges.

John Harmon grew up in Palmer, graduated from Palmer High School in 1985, and is now an Anchorage educator and a former Fortune 500 corporate attorney.

MERIT SELECTION: CHOOSING JUDGES BASED ON THEIR POLITICS UNDER THE VEIL OF A DISARMING NAME

CLIFFORD W. TAYLOR*

Given the dispute in this country about the proper role of judges and how the people perceive what judges are doing, any sophisticated observer must conclude that judicial selection in the United States today is "political."[1] People, whether or not they are educated, sophisticated, or engaged in a legal career, are largely divided into two schools of thought about what judges ought to do. This dispute has at its heart one question: What is the proper scope of a judge's authority?

There is a traditional approach to judging that is advanced by conservatives and judges in the Scalia and Bork model. According to this traditional approach, judges are to interpret constitutions and statutes by attempting to discern the original understanding of the drafters or ratifiers and judges are then to follow that original understanding.[2] There is very little latitude

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* Judge in Residence, Ave Maria School of Law; Chief Justice, Michigan Supreme Court, 2005–08; Justice, Michigan Supreme Court, 1997–2005. I would like to thank my intern, Bradley Fowler, for his invaluable assistance. Remarks originally delivered to the Twenty-Seventh Annual National Federalist Society Student Symposium, held at the University of Michigan Law School in Ann Arbor, Michigan.

1. *See, e.g.*, AM. BAR ASS'N, JUSTICE IN JEOPARDY: REPORT OF THE ABA COMM'N ON THE 21ST CENTURY JUDICIARY 13–18 (2003), *available at* http://www.abanet.org/judind/jeopardy/pdf/report.pdf (describing "recent developments that have politicized the American judiciary"); ZOGBY INT'L, ATTITUDES AND VIEWS OF AMERICAN BUSINESS LEADERS ON STATE JUDICIAL ELECTIONS AND POLITICAL CONTRIBUTIONS TO JUDGES 4–5 (2007), *available at* http://www.ced.org/docs/report/report_2007judicial_survey.pdf ("[F]our in five executive-level respondents from the companies surveyed (79%) indicat[ed] a belief that campaign contributions have an impact on judges' decisions."); George D. Brown, *Political Judges and Popular Justice: A Conservative Victory or a Conservative Dilemma?*, 49 WM. & MARY L. REV. 1543, 1569 (2008) ("[F]our Supreme Court Justices [(Souter, Stevens, Ginsburg, and Breyer)] recently voiced concern about the effects of politicization on state courts.").

2. *See, e.g.*, Robert H. Bork, *The Judge's Role in Law and Culture*, 1 AVE MARIA L. REV. 19, 27–28 (2003); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862–64 (1989).

in this approach to judicial interpretation. The judge's role is important but constrained.[3]

The other approach, advanced by liberals, including almost the entire legal academy, supports a more aggressive role for judges. This model—the Douglas-Brennan-Breyer model—sees judges as possessing a greater capacity to make policy in politically contentious areas such as the death penalty, affirmative action, abortion, religion in the public square, sexual liberty, same-sex marriage, and so on through vehicles such as living constitutions, unenumerated rights, and the infamous emanations and penumbras.[4]

The point not to be missed, then, is that a split exists on the issue of the role of a judge. Moreover, few would doubt that this is an important public policy issue, as the titanic battles of the last twenty years in the United States Senate over the confirmation of federal judges demonstrate.[5] Those battles inescapably turn on the potential judge's position in this debate.[6]

Everyone wants judges who agree with them on the proper role of a judge. This reality cannot be wished away. Any effort to construct a judicial-selection system that acts as though this is not the current state of affairs ignores the proverbial elephant in the room. Yet the merit-selection approach—which asserts that all a state has to do is find the best-qualified lawyers and make them judges[7]—asks the states to operate as though there is no elephant. Indeed, that is the fatal flaw of a merit-selection approach.

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3. *See* Clifford W. Taylor, *A Government of Laws, and Not of Men*, 22 T.M. COOLEY L. REV. 199, 201–02 (2005).

4. *See, e.g.*, STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 6 (2005); Michael Waldman, *Introduction for the Brennan Center for Justice and Thomas Jorde Living Constitution: A Symposium on the Legacy of Justice William J. Brennan, Jr.*, 95 CAL. L. REV. 2185, 2185–86 (2007); Justice William J. Brennan, Jr., Speech to the Text and Teaching Symposium at Georgetown University (Oct. 12, 1985), in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 55–70 (Steven G. Calabresi ed., 2007); Travis A. Knobbe, Note, *Brennan v. Scalia, Justice or Jurisprudence? A Moderate Proposal*, 110 W. VA. L. REV. 1265, 1269–70 (2008).

5. *See, e.g.*, David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033, 1033 (2008) (book review).

6. *See, e.g.*, Stephen B. Presser, *Judicial Ideology and the Survival of the Rule of Law: A Field Guide to the Current Political War over the Judiciary*, 39 LOY. U. CHI. L.J. 427, 434 (2008).

7. *See, e.g.*, Mark S. Cady & Jess R. Phelps, *Preserving the Delicate Balance Between Judicial Accountability and Independence: Merit Selection in the Post-White World*, 17 CORNELL J.L. & PUB. POL'Y 343, 352–53 (2008).

I am not in favor of merit selection, even though it has the benefit of an appealing title. I am, with certain misgivings, an advocate for the popular election of judges, with the elections being full of robust debate as anticipated by the Supreme Court decision in *Republican Party of Minnesota v. White*.[8] There are certainly problems with the election of judges, as there are problems with all elections. These include voter ignorance and voter misdirection by clever partisans.[9] Although the electoral system has these problems, at least it acknowledges this reality. Rather than having elites make the decision while operating in a "good government" fog—which is also a largely political decision—judicial elections give the choice to ordinary, rank-and-file voters.

It is common in the modern age to condescend to regular folks, but this attitude should give us pause because the notion that citizens can make wise choices is unquestionably at the very heart of our system of government.[10] In considering this recent bias against elections, it is useful to recall the famous quip by William F. Buckley, Jr., who said he would rather entrust the government of the United States to the first 2000 people listed in the Boston telephone directory than to the faculty of Harvard University.[11] There is wisdom in that quip.

Edmund Burke, the eighteenth-century English statesman and political philosopher, made one of his many penetrating and arresting observations when he argued for something akin to popular government. Burke maintained that although individual Englishmen could make poor choices, as a whole and over time the English people would not.[12] Thus, popular government could work. It is a simple but nonetheless sophisticated notion. Indeed, American and English history proves the truth

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8. 536 U.S. 765, 772, 781–82 (2002).

9. *See, e.g.*, Lee Goldman, *False Campaign Advertising and the "Actual Malice" Standard*, 82 TUL. L. REV. 889, 917–18 (2008); Marvin Krislov & Daniel M. Katz, *Taking State Constitutions Seriously*, 17 CORNELL J.L. & PUB. POL'Y 295, 331 (2008); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1291–93 (2004).

10. *See* THE FEDERALIST NO. 71 (Alexander Hamilton).

11. *See* Lino A. Graglia, Grutter *and* Gratz*: Race Preference to Increase Racial Representation Held "Patently Unconstitutional" Unless Done Subtly Enough in the Name of Pursuing "Diversity,"* 78 TUL. L. REV. 2037, 2040 (2004).

12. *See* EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 185 (London, J. Dodsley 1790).

of that insight. Americans should be reluctant to assume incompetence in their fellow citizens to make judicial choices, especially because history has shown them competent to make other difficult electoral choices in other branches of government.

Moreover, upon closer examination, even merit-selection advocates would have to admit that their favored system in practice is also driven by politics. The difference is that in merit selection the politics are driven underground, whereas the politics of elections are public and obvious. Studies of the flagship merit-selection process in Missouri indicate that merit selection does not remove politics from the process but instead makes the politics harder to unearth by hiding it from public scrutiny and voter reaction.[13]

The classic study of the first twenty-five years of Missouri merit selection, *The Politics of the Bench and the Bar*, indicates that the attorneys who chose the lawyer members of the nominating commissions—merit selection is always lawyer-dominated—tended to split into two groups, the plaintiffs' bar and defense attorneys.[14] Their choices were founded in part on their clients' broad socioeconomic interests. No one should be surprised that lawyers would consider their clients' interests, or their own, in choosing those who choose judicial nominees. In other words, one type of politics—the politics of self-interest—replaced another.

Recently, when Justice O'Connor contended that judicial elections have become "political,"[15] one was tempted to respond, "You say that as if it is a bad thing." For those who advocate merit selection, "political" seems to be code for having the people involved in the selection of their judges. I am not persuaded that the reputation or quality of state courts suffers because the people have that choice. Moreover, there is little evidence that states with merit selection have better judicial decision-making than those that elect their judges.[16] How then

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13. RICHARD A. WATSON & RONDAL G. DOWNING, THE POLITICS OF THE BENCH AND THE BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN 352 (1969).

14. *See id.* at 21–22.

15. Sandra Day O'Connor & RonNell Andersen Jones, *Reflections on Arizona's Judicial Selection Process*, 50 ARIZ. L. REV. 15, 23–24 (2008).

16. *See* Stephen J. Ware, *Selection to the Kansas Supreme Court*, 17 KAN J.L. & PUB. POL'Y 386, 396–97 (2008).

can we justify taking the choice away from voters and placing it in the hands of a select few? The arguments presented so far are unconvincing.

What must be acknowledged, even if perhaps unwelcome, is that there is an increasing national perception that courts are out of control.[17] The appropriate response to that concern is not to take the people out of the selection process. Notice who is not calling for merit selection: it is not the business community, not labor unions, not farmers, teachers, retirees, or church pastors. Merit selection calls come only from either lawyers or advocacy groups who are opponents of judicial elections.[18] They are hardly the only people who care about justice; they simply want the whip hand in choosing who dispenses it. These people do not truly want to preserve judicial independence, which is not really threatened. They want to make sure that candidates who share their views in the great debate over the role of judges will have a selection system that strengthens their prospects of making it to the bench.

Merit selection is a solution that fails to acknowledge the real problem. Politics will always play a role in the selection of judges. Do we want it openly and robustly present in the public square or behind closed doors with phony proclamations that the process is looking for the best person using impartial measures? In sum, all selection systems for the foreseeable future will be political. We need to acknowledge that reality and evaluate methods of selection with that truth in mind. Public elections, though not flawless, appear better in that regard compared to the alternative merit-selection system.

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17. *See, e.g.*, Leita Walker, *Protecting Judges from* White's *Aftermath: How the Public-Employee Speech Doctrine Might Help Judges and the Courts in Which They Work*, 20 GEO. J. LEGAL ETHICS 371, 382–83 (2007) ("[F]orty-six percent of [survey] respondents agreed that judges were 'arrogant, out-of-control and unaccountable.'").

18. David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 309 (2008).

Testimony of Robert B. Flint
to the Senate State Affairs Committee
on SJR3
February 19, 2015

I am a retired attorney and member of the Alaska Bar for 51 years. I support the resolution and the need to reform the process of judicial selection in Alaska so that it conforms with the democratic system to which this country has been committed since its founding. Specifically, I concur with the consultant's report to the Constitutional Convention in 1955 that Alaska's Missouri Plan goes too far in separating the selection of one of the three branches of government from the democratic process.

Recently, the Kennedy School of Government at Harvard released a study of the ideological bent of the legal profession and judges. As reported in the February 1 *New York Times*, the lawyers are, in all categories of the profession, to the left of the general public, and, in some cases, such as government lawyers and public defenders, overwhelmingly so. Judges, on the other hand, though still to the left, are closer to the American profile than lawyers. This difference is attributed to the influence of selection through the political process of election or guvanatorial nomination and legislative confirmation which the Missouri Plan intended to eradicate. This raises the serious question of whether one branch of government, which operates without the checks and balances applicable to the other two branches, and the people as a whole, should be the preserve of, and represent the views of, one professional class. Since the US Constitution guarantees the states a republican form of government, I say the answer is a resounding "No."

The defense of the new advocacy group for the lawyers, Justice Not Politics, is simple. Everything is fine. The system isn't broken. The opponents are just religious people who don't like court decisions. In fact, objections to the grip of the lawyers in the selection process has come regularly from governors who want more nominees so they can meaningfully exercise the right of appointment. These objections have been ignored by the Judicial Council. These happen to be the more conservative governors, there having been no objections from the more liberal governors. Given the Harvard study, this is no surprise. The pieces fit together.

Here are some modest proposals for the lawyers on the Judicial Council to address the issues raised. First, recognize the validity of the complaints by past governors and send up more names. Second, the Judicial Council should be a nominating body, not a selection committee. Eliminate the "most qualified" requirement in the Council bylaws. That restriction isn't in the Constitution, and, in any event, qualifications are set by the Constitution itself and by statute, i.e., by the legislature, not the Judicial Council. In practice, "most qualified" isn't a standard anyway. Applicants have been nominated one time and not another even though their qualifications haven't changed, demonstrating that "most qualified" is meaningless. Third, the Chief Justice should not vote for Supreme Court nominees. That is a clear conflict. Finally, debate the issues. The attack on religious people is a straw man and demeaning. Lawyers, above all people, ought to know that religious people have the same constitutional rights to debate as they do.

Daniel George

From: Mike Coons <mcoons@mtaonline.net>
Sent: Thursday, February 19, 2015 9:32 AM
To: Daniel George
Subject: Testimony SJR 3 Updated

Follow Up Flag: Follow up
Flag Status: Flagged

My name is Mike Coons from Palmer and speaking for myself.

I fully support SJR 3 .

I fully support adding members to the Judicial Counsel and that all, both lawyers and citizens must be confirmed by the Legislature! This is transparency as it should be! Also, as a voter since 1994 I have seen very little solid information on Judges to the voters prior to elections.
Over the years, the information from the Judicial Counsel has been lean and not helpful in helping me to make an informed decision on voting.

This amendment puts more citizen's than lawyers in the counsel which hopefully will add a better level of evaluation and scrutiny of the applicants to Judge seats and existing Judges. I want a counsel that will evaluate with a bias towards our liberties and freedoms as per the State
and US Constitutions! That includes the applicants views as well as
sitting Judges for "promotion" of their history of decisions both from opinions on the Alaska Constitution as well as enforcement of the law as per civil and criminal decisions. I will vote no, if I know any Judge who is lenient or has legislated from the bench! Sadly, the the Counsel is mute on this issue.

I want to know if a Judge is following the Alaska Constitution and the US Constitution or is legislating from the bench. Those who legislate must be voted out or not recommended to a higher court. I do hope that my fellow citizens on the Counsel will let us the voters know whom these judges are and pick judges who rule by the Constitution, Natures God and not progressive views that the Constitution is a living breathing document.

We must have a counsel that will not endorse Judges based on the lawyers in the counsel recommendations. We must have citizens who will give great scrutiny to any applicant as to their knowledge of the State Constitution and the US Constitution. We know that the law schools are not teaching the Constitution so just because a person is a lawyer does not mean they know about liberty and freedom as per the State and US Constitutions!

I'm not asking for a "Hanging Judge" evaluation of the Judges or applicants for Judges, but I do want some clear history of what these judges are doing and what the applicants may do, frankly I do not believe a counsel like we have now is doing that with the lawyers, in my opinion, swaying those determinations. This may be viewed by other speakers
wrongly, but frankly perception with voters can and does become reality.
I may not be a lawyer, but I know what is right and wrong and what smells and what doesn't. I want common sense, the clear following of the Constitution, not legalese.

In closing, this past election we had three referendums that were based more on emotion than solid facts. This is a Constitutional Amendment that is and will be fully vetted and voted on by the State Legislature based on facts and the law. I want to vote for the Constitutional amendment, vote yes so that We the People can then make informed decision on facts, not emotion!

Mike Coons
Palmer AK
745-6779

Daniel George

From: Grant Hunter <hunterpp@gci.net>
Sent: Sunday, March 01, 2015 5:01 PM
To: Sen. Bill Stoltze
Subject: SJR 3

I respectfully request that you support SJR 3 (Proposing amendments to the Constitution of the State of Alaska to increase the number of members on the judicial council; relating to the initial terms of new members appointed to the judicial council; and relating to the confirmation of members of the judicial council.)

As we all know the Alaska Supreme Court has increasingly assumed the role of an alternative legislative body in many areas of social and economic policy by creating out of thin air new legal burdens upon the purses and persons of Alaska. I refer to decisions with regard to defined benefit pension rights for time not yet worked, public sector family benefits for homosexual couples, homosexual marriage and mandatory public sector financing for abortion.

It is simply a violation of the principles of democratic accountability that the Alaska Bar Association, a private organization, has such control over judicial selection. The membership of the Alaska Judicial Council, if it is to have a role in judicial selection, should reflect a broader cross-section of the people.

SJR 3 is step in the right direction.

Grant W. Hunter JD MLS MBA

645 G Street Ste 100 PMB 653

Anchorage, AK 99501

Tel: 907.258.6735 Cell: 907.444.7295

Email: hunterpp@gci.net Cell Email: granthunter56@gmail.com

Ipad Email: gwhunter56@icloud.com

Alaska Federation of Natives
2014 Annual Convention
Resolution 14 - 37

TITLE: A RESOLUTION SUPPORTING ALASKA'S CURRENT SYSTEM OF SELECTION AND RETENTION OF STATE COURT JUDGES

WHEREAS: The Alaska Federation of Natives (AFN) is the largest statewide Native organization in Alaska and its membership includes 165 federally-recognized tribes, 146 village corporations, 12 regional corporations, and 12 regional nonprofit and tribal consortiums that contract and compact to run federal and state programs; and

WHEREAS: The mission of AFN is to enhance and promote the cultural, economic, and political voice of the entire Alaska Native community; and

WHEREAS: The Alaska Judicial Council (AJC) is an independent citizens' commission established by the Alaska Constitution to screen applicants for judicial vacancies, nominate the most qualified applicants for appointment by the governor, evaluate the performance of sitting judges, recommend to voters whether judges should be retained, and conduct research related to the administration of justice in Alaska; and

WHEREAS: The Alaska Constitution provides that the AJC shall have seven members, including three attorneys appointed by the Alaska Bar Association, three non-attorneys appointed by the governor and confirmed by the legislature, and the Chief Justice of the Alaska Supreme Court, who acts as the chairperson; and

WHEREAS: Through the AJC process the Alaska Constitution created a merit-based system for appointing judges while retaining accountability to the voters, and this Alaska system is widely considered to be one of the best state judicial selection processes in the United States; and

WHEREAS: AFN does not support any amendments that would change Alaska's merit- based system for selecting judges into a partisan political process controlled by the governor and in the long term would inevitably diminish the quality and fairness of the state judiciary; and

WHEREAS: Alaska Native Tribes, tribal organizations, and individual Alaska Natives subjected to Alaska's civil or criminal judicial system are best served by an independent state judiciary, selected on merit.

NOW THEREFORE BE IT RESOLVED that the delegates of the 2014 Annual Convention of the Alaska Federation of Natives support Alaska's current system of selection and retention of state court judges; and

BE IT FURTHER RESOLVED that the Alaska Federation of Natives opposes any attempt to amend the Alaska Constitution to alter the composition of the Alaska Judicial Council to politicize the judicial selection process; and

BE IT FURTHER RESOLVED that this resolution shall be the policy of AFN until it is withdrawn or modified by subsequent resolution.

SUBMITTED BY: Bristol Bay Native Corporation, Bristol Bay Native Association, Aleut Corporation, CIRI
COMMITTEE ACTION: DO PASS
CONVENTION ACTION: ADOPT

ANCSA REGIONAL ASSOCIATION
Bringing Together Regional Corporation Presidents and CEOs

PO Box 240766 • Anchorage, AK 99524 • **907 339 6052**

February 18, 2015

Senator Bill Stoltze, Chair
Senate State Affairs Committee

Re: Senate Joint Resolution 3

Dear Senator Stoltze:

On behalf of the ANCSA Regional Association ("the Association"), we submit this letter in opposition of Senate Joint Resolution 3. By way of background, the ANCSA Regional Association represents the Chief Executive Officers of the 12 land-based regional Alaska Native Corporations (ANCs), as well as the President of the Alaska Federation of Natives. Our corporations are owned by over 100,000 Alaska Native people and were formed under the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1601, et. seq. (ANCSA). Our mission is to collaborate in the creation of a sustainable socioeconomic future for Alaska Native people. ANCSA Regional Corporations have grown into an economic engine of Alaska. When measured against the top 49 Alaska-owned companies, ANCs account for 73.4 percent of the revenue earned, 66.3 percent of Alaskan jobs and 83.5 percent of the worldwide employment. Twenty-two ANCs, including all twelve ANCSA Regional Corporations, are among the top 49 companies.

The Alaska Judicial Council (Council) is an independent citizens' commission created by the Alaska Constitution to screen applicants for judicial vacancies, nominate the most qualified applicants for appointment to the bench by the governor, evaluate the performance of sitting judges, recommend to voters whether certain judges should be retained for another term, and conduct research to improve the administration of justice in Alaska. SJR 3 seeks to double the number of politically appointed non-attorney members of the Council, from three to six and require legislative confirmation of all members of the Council. The increase in politically appointed members is due purportedly to concerns over the lack of regional representation and attorney dominance over the process.

The ANCSA Regional Association opposes efforts to alter the membership of the Council, for several reasons.

First, judicial appointments should be made from the "most qualified," not politically expedient, candidates. As one Constitutional Convention delegate explained, judicial selection is rooted in a commitment to the principle that Alaskans deserve judges of "the best available timber." The delegates recognized that a merit-based screening process, followed by the chief executive's ultimate selection and decision, is preferential to the extremes of selecting judges based on either election or direct appointment.

Attorney delegates are ideally suited to balance the voice of non-attorney members in conducting a preliminary screening of judicial applicants. Attorneys spend time in court and elsewhere, closely assessing professional competence, experience, knowledge, ethics and temperament. Since all judicial candidates are assessed and scored by attorneys in a "bar poll," the three attorneys on the council provide invaluable feedback evaluating these poll results. Attorney Councilmembers are apolitical. To serve on the Council, attorneys are selected based upon a Bar Association advisory vote based on professional experience and ability to determine qualifications for judicial service. Unlike political elections or appointments, this attorney vote occurs without regard to political affiliation.

The proposed amendments would diminish the role of the Council's attorney members and undercut the intent of the process of screening candidates based solely on aptitude and suitability for the bench. By definition, the amendments would tilt the balance away from professional qualifications and toward partisan politics, weakening the Constitution's commitment to merit-based judicial selection.

Second, this is not a problem that needs fixing. In the last 30 years, only 16 of the total 1,149 votes by the Alaska Judicial Council have resulted in a 3-3 split between attorneys and public members. That is 1.4 percent. In fact, over 81 percent of all votes have been unanimous or near unanimous but for one, because the non-attorneys and attorneys complement each other's evaluations and typically agree about rudimentary, objective judicial qualifications. There is no evidence to suggest that the Council has failed to function effectively or efficiently in performing its duties. Alaska's judiciary has been free of corruption, scandal, and cronyism. The proposed amendments would endanger that precious dynamic based upon unfounded perception.

Third, the public already has ample opportunity to participate. Whenever there is a judicial vacancy, the Council holds a public comment period. The public can comment at Council meetings orally or in writing and are given the option of signing the comments. The Council, as a public entity, is available to answer questions concerning its processes.

Fourth, increasing the non-attorney Council members does nothing to increase rural or regional representation on the Council, or address minority or regional access to the bench. Allowing the current Governor to appoint three more members to the Committee does nothing to fix the historically geocentric selections to the Council. The proposed amendments only would guarantee an even larger membership consistent with the political leaning of the existing executive, without regard to regional experience or affiliation.

Finally, our state's constitution should never be amended to effectuate short-term political objectives. The Framers set out a set of core principles and processes to secure broad-based rights for the people of Alaska, and that statement of overarching governmental principles and structures should not be tampered with whimsically. We should not follow the example of states like Alabama, which has amended its constitution 770 times. Our constitution must remain a core governing document, not a statute book replete with mutable processes and procedures effectuating the political winds of the day.

The ANCSA Regional Association strongly opposes SJR 3. If you have questions or comments regarding the content of this letter, please feel free to contact me directly.

Sincerely,
ANCSA REGIONAL ASSOCIATION

Kim Reitmeier

Kim Reitmeier
President

cc: Senate State Affairs Committee Members
Senator John Coghill, Vice-Chair
Senator Charlie Huggins
Senator Lesil McGuire
Senator Bill Wielechowski
ANCSA Regional Association Board of Directors

March 9, 2015

Honorable Pete Kelly
State Capitol
Juneau, AK 99801

Dear Senator Kelly

On behalf of thousands of workers in Alaska in industries from city government to pipe crafts, I respectfully submit this letter of opposition to SJR 3.

When the system intended to protect workers through collective bargaining and labor practice standards fails to come to resolution, the courts are the last refuge for workers.

Workers depend on the judiciary to help resolve issues that arise in arbitration, protecting steward and worker rights on the job site and in the final adjudication of unfair labor practices. The consequences of these decisions are often precedent setting and usually involve great sums of money.

Workers and employers are both dependent on a fair and impartial judiciary to come to a final resolution of issues that arise in bargaining. Each party can be certain that under the current make up, the courts findings will be based in the law and free from political bias.

By inserting legislative approval of the Alaska Judicial Council's attorney members in to the process, the Legislature would be excessively politicizing the applicant pool.

This is deeply concerning to us and is dangerous to workers. We bargain with employers in good faith, but if the employers knew they had a court that would see their side, they would simply drive bargaining to impasse and jump straight to a friendly court.

We urge the Legislature to leave the Constitution as is and to let a system that has worked well since statehood remain. Alaska workers and employers too often require a fair and impartial judiciary to decide the final status of a collective bargaining process. Fairness is essential for both parties.

The current system is fair. It should be retained.

Respectfully,

Vince Beltrami

Vince Beltrami
President, Alaska AFL-CIO
3333 Denali St Ste 125
Anchorage, AK 99503

Daniel George

From: Sue Johnson <scjohnson@gci.net>
Sent: Tuesday, February 17, 2015 2:46 PM
To: Sen. Charlie Huggins; Sen. Lesil McGuire; Sen. Bill Wielechowski; Sen. Bill Stoltze; Sen. John Coghill
Subject: Oppose SJR 3

Dear Senators:

I want to go on record to express my opposition to SJR 3. I believe we should preserve the separation of powers between the Judicial Branch and the Legislative Branch in order to keep the politics out of our justice system.

Allowing a Governor to appoint most of the council members and then obtain legislative confirmation politicizes Alaska's merit-based judicial selection and retention process. It also gives the Executive and Legislative Branches undue influence over the Judicial Branch and undermines the checks and balances that are needed for a fair and nonpartisan process. It is critical for us to possess judicial independence in our society.

Thanks for your consideration.

Respectfully,

Sue C. Johnson

Anchorage

Daniel George

From: Leslie Hiebert <lhiebert5@gmail.com>
Sent: Monday, February 16, 2015 3:23 PM
To: Sen. Bill Stoltze
Subject: SJR3

I am a lawyer and have practiced before the trial courts, Court of Appeals, and Supreme Court in Alaska. I also have experience trying cases in Texas where judges are elected and politicized. Alaska has a strong, ethical, and competent judiciary. I can't imagine a judge asking me if I had contributed to his campaign fund or telling me he would "charge rent" on the courtroom if I tried my case in front of him. This happened in Austin. Another judge told me I owed him because he dismissed a case I defended on my motion - even though the dismissal was due to lack of jurisdiction. Alaska needs and deserves judges who adhere to the rule of law and who are not there despite weak skills or because of popular appeal. Please do not alter the way we select our judges. Thank you.
>
> Leslie Hiebert
> Bar No. 8406029

Daniel George

From: tparagi@alaska.net
Sent: Wednesday, February 18, 2015 7:37 PM
To: Sen. Bill Stoltze; Sen. John Coghill; Sen. Charlie Huggins; Sen. Lesil McGuire; Sen. Bill Wielechowski
Subject: please oppose SJR 3

Dear Senators,

I urge you to oppose SJR 3 that proposes to increase the number of non-attorney members of the Alaska Judicial Council from 3 to 6.

Upon learning of the resolution I read about the purpose and responsibilities of the Alaska Judicial Council and then read a recent letter to the Fairbanks
newspaper:

http://www.newsminer.com/opinion/community_perspectives/judicial-council-bill-a-fix-in-search-of-a-flaw/article_d1e62e36-b1c8-11e4-908d-1bd57a06c7b0.html

I have not perceived controversy over this issue nor heard complaints over the nomination and endorsement procedures that are shown in the voter pamphlet at elections. I can understand the rationale to broaden citizen input, but random selection from among a group of people willing to do it (assuming other qualifications, e.g., resident, registered voter, non-felon) would be a more equitable means of selection than political appointments.

If the proposal for 3 new seats were to occur more like jury selection, I would support it. However, to my knowledge that would require an amendment to the Alaska Constitution.

Sincerely,

Tom Paragi
1271 Lowbush Lane
Fairbanks, AK 99709

Daniel George

From: Rosy Jacobsen <rosyandjordan@gmail.com>
Sent: Tuesday, February 17, 2015 8:29 AM
To: Sen. Bill Stoltze; Sen. John Coghill; Sen. Charlie Huggins; Sen. Lesil McGuire; Sen. Bill Wielechowski
Subject: No on SJR 3, please!

Categories: Committee

I've been an Alaska resident for 25 years and appreciate the current merit-based system for selecting and retaining judges. I always cringe when we're Outside and see politics interfering with - or even just appearing to interfere with - judicial selection. The politics of the day (whether right or left) shouldn't hold any sway in who our judges are!

Please preserve the Constitutional Separation of Powers and our merit-based system by saying No to SJR 3. Thanks for listening!

Rosanne Jacobsen
1703 Nunaka Dr
Anchorage AK 99504
907-229-2799

Daniel George

From: TOM WAGNER <tomwagnerak@gmail.com>
Sent: Monday, February 16, 2015 3:50 PM
To: Sen. Bill Stoltze; Sen. John Coghill; Sen. Charlie Huggins; Sen. Lesil McGuire; Sen. Bill Wielechowski
Subject: Please do not pass SJR3

Dear Members of the Senate State Affairs Committee:

I write to urge you to vote against approval of SJR3. That bill would weaken Alaska's judicial system for years into the future. Alaska's judicial selection and retention system is probably the finest in the country. If it ain't broke, don't fix it!

The Alaska Judicial Council is composed of three non-lawyer members and three lawyer members, plus the state's chief justice who acts as ex-officio chair. The bill would add three more non-lawyer members, and would subject the lawyer members to confirmation by the legislature. The intent, I assume, is to ensure the non-lawyer members are not overrun by the lawyer. In fact, it would render our current merit selection process more political, cumbersome, and expensive than it needs to be, or should be.

The current system, as designed by the constitutional framers, first provides a nonpolitical method for the council to nominate a slate of highly qualified candidates for the governor to select from. The lawyer members probably have the most experience dealing with judges and lawyers. They have practical experience in dealing with the character traits and methods that make a candidate likely to be a good judge. The lawyer members and the non-lawyer members are both expected to have a good deal of sensitivity to those traits that might impinge on the public. This part of the selection process is to be merit based and not political. It is to ensure that only the most highly qualified candidates are forwarded to the governor.

The second part of the selection process, the selection of a judge from the slate of highly qualified candidates, is political. The governor, by virtue of his or her election as governor, is by definition pretty good at dealing with political matters and is responsive to the constituents.

To inject politics into the first part of the process by requiring legislative confirmation of the lawyer members, would weaken the first, nonpolitical, part of the selection process.

To expand the number of non-lawyers to six, while having only three lawyer members, would damage the balance of selecting for both professional competence and personal character traits. Moreover, a committee of ten,

including the ex-officio chair, would be much more unwieldy, cumbersome, and expensive to convene and work with than the current group of seven.

For these reasons, I urge you to vote against advancement of SJR3. Thank you for your consideration.

Tom

Tom Wagner, Lawyer

417 Harris Street

Juneau, AK 99801

tomwagnerak@gmail.com

tel (907) 586-2529

fax (907) 586-8012

Daniel George

From: Erin Dougherty <erincdough@gmail.com>
Sent: Tuesday, February 17, 2015 2:02 PM
To: Sen. Bill Stoltze
Subject: Comment re: SJR 3

Hi Senator Stoltze,

I'm writing to you as a member of the State Affairs Committee to voice my opposition to SJR 3, which will be taken up by the Committee later this week. SJR 3 intends to change Alaska's process of selecting judges. Alaska's Constitutional Convention had the opportunity to review the processes for how 48 other states and wisely created a system that puts merit first and keeps politics out of the courtroom. One need only look to other states in the Lower 48 with highly politicized courts to see that Alaska's Constitution got it right.

I encourage you to please vote against SJR 3.

Warm regards,
Erin Dougherty
(907)351-6980

Daniel George

From: Barbara Hood <middlerockraven@gmail.com>
Sent: Wednesday, February 18, 2015 10:01 PM
To: Sen. Bill Stoltze
Subject: Please Oppose SJR 3

Follow Up Flag: Follow up
Flag Status: Completed

Sen. Stoltze,

As an Anchorage small business owner for over 20 years and a retired attorney, I'm strongly opposed to SJR 3, the effort to amend Alaska's constitution to change the composition of the Alaska Judicial Council. As an attorney, I understand that insulating the judicial branch from increased political influence is essential if we are to protect fair and impartial courts. As a business owner, I appreciate the need for courts to be balanced and independent, and to ensure consistent decision making in accordance with the rule of law. Both interests are poorly served by the proposed changes, and would in fact be seriously undermined. Our judicial selection and retention system has worked well for half a century and is not broken.

Please vote against this ill-advised proposal.

Thank you,

Barbara Hood
10161 Middlerock Road
Anchorage, AK 99507

907-770-4920 h
907-301-5362 c

Daniel George

From: Tom <tom082009@gmail.com>
Sent: Friday, February 20, 2015 11:05 AM
To: Sen. Pete Kelly; Sen. Bill Stoltze; Sen. John Coghill; Sen. Charlie Huggins; Sen. Lesil McGuire; Bill.Wielechowski@akleg.gov
Cc: Rep. David Guttenberg
Subject: SJR 3

Dear Senator Kelly and members of the Senate State Affairs Committee:

Please Do Not Pass SJR 3. My personal experience argues that they produce well qualified candidates.

When I worked for Tony Knowles, I participated in interviews of judicial nominees with the Governor whenever they were from Fairbanks and we saw well qualified candidates of all supposed ideologies.

For example, for a Superior Court opening, among the three names forwarded by the Council, one was a known 'conservative' District Court judge. The Governor did not choose him, nor did he choose him for a second opening later on. Time passed and his name was forwarded for a third opening. This time, the Governor and the judge were on casual speaking terms during the interview and the candidate said in effect, 'I guess you will never appoint me, I'm too conservative."

However, the Governor told the judge he was selecting him because he was the most qualified among the three, explaining that on the two previous occasions, there were simply better qualified candidates and that his supposed ideology had nothing to do with it.

The arguments for SJR 3 ignore the fact that the council has consistently done precisely what it is asked to do: produce high caliber nominees. The evidence is the public's voice of inarguably high judicial retention vote rates.

I have great confidence they will continue to do so.

Thank you for your consideration.

Tom Moyer, Fairbanks

Governor's Office 1995-2002

Daniel George

From: Nicole Borromeo <nborromeo@nativefederation.org>
Sent: Tuesday, February 24, 2015 3:48 PM
Cc: Julie Kitka
Subject: SJR 3, Alaska Judicial Council
Attachments: AFN Judicial Council Letter.docx; AFN Reso. 14-37[1].pdf

Dear Alaska State Legislator,

Please find attached a letter from Alaska Federation of Natives President Julie Kitka urging you to oppose Senate Joint Resolution 3, Alaska Judicial Council, along with a resolution from our 2014 Annual Convention requesting the same.

As you may know, AFN is the largest statewide Native organization in Alaska, and our annual convention is the largest representative gathering of Native peoples in the United States. Each October more than 3,500 voting delegates gather in Anchorage or Fairbanks to adopt policy guidelines and advocacy statements for AFN for the coming year through our resolution process. At our 2014 Convention, the delegates unanimously passed attached Resolution 14-37, 'A Resolution Supporting Alaska's Current System of Selection and Retention of State Court Judges.'

If you have any questions about the content of the letter or require clarification on the resolution, please contact Ms. Kitka or me directly. AFN looks forward to providing public testimony on SJR 3 as the resolution moves through your respective committees.

Kind Regards,

Nicole

Nicole Borromeo
General Counsel
Alaska Federation of Natives
1577 C St. | Ste. 300 | Anchorage, AK 99501
T (907) 263-1310 | F (907) 276-7989
nborromeo@nativefederation.org
www.nativefederation.org

ALASKA FEDERATION OF NATIVES

February 24, 2015

Sent Via Electronic Mail
Members of the 29th Alaska State Legislators

Re: Senate Joint Resolution 3, Alaska Judicial Council

Dear Legislator:

The Alaska Federation of Natives' membership – which includes 165 federally recognized tribes, 146 village corporations, 12 regional corporations, and 12 regional nonprofit and tribal consortiums that contract and compact to run federal and state programs – stands in strong opposition to Senate Joint Resolution 3, which proposes amending Alaska's Constitution to double the number of gubernatorial appointees on the Alaska Judicial Council and requiring all Council members to be confirmed by the Alaska State Legislature.

The founders of the Alaska Constitution structured the Council to insure the impartiality and independent nature of the Judiciary, a co-equal form of government with the Governor and the Legislature. The Council includes three members chosen by the Governor, three attorney members selected by the Board of Governors of the Alaska Bar Association, and the Chief Justice of the Alaska Supreme Court, who votes only to break ties. The Council conducts an exhaustive review of candidates for judgeships, receives public comment through a variety of venues and nominates the most highly qualified applicants to the Governor, who makes the final appointment.

This system has served Alaska well for over 50 years and has provided a state judiciary where Alaskans can feel confident that only the most qualified and most impartial individuals will ascend to a judgeship. Alaska has one of the least politicized state judicial selection and retention systems in the nation, one where judges are not beholden to political influence, but have a sole commitment to supporting the rule of law.

The changes proposed by SJR 3 would allow a Governor to appoint a majority of Council members and would allow the Legislature to approve all members; thus giving the Executive and Legislative branches undue influence over the Judicial branch and undermining the checks and balances that form the foundation of our democracy.

The system is not broken. It has served Alaskans well. It is for these reasons that the voting delegates to the 2014 Annual AFN Convention approved the enclosed Resolution 14-37, 'A Resolution Supporting Alaska's Current System of Selection and Retention of State Court Judges.' On behalf of AFN, I strongly urge you to oppose SJR 3.

Sincerely,
ALASKA FEDERATION OF NATIVES

Julie Kitka
President

1577 C STREET, SUITE 300 • ANCHORAGE, AK 99501 • TEL 907-274-3611 • FAX 907-276-7989 • WWW.NATIVEFEDERATION.ORG

Alaska Federation of Natives
2014 Annual Convention
Resolution 14 - 37

TITLE: A RESOLUTION SUPPORTING ALASKA'S CURRENT SYSTEM OF SELECTION AND RETENTION OF STATE COURT JUDGES

WHEREAS: The Alaska Federation of Natives (AFN) is the largest statewide Native organization in Alaska and its membership includes 165 federally-recognized tribes, 146 village corporations, 12 regional corporations, and 12 regional nonprofit and tribal consortiums that contract and compact to run federal and state programs; and

WHEREAS: The mission of AFN is to enhance and promote the cultural, economic, and political voice of the entire Alaska Native community; and

WHEREAS: The Alaska Judicial Council (AJC) is an independent citizens' commission established by the Alaska Constitution to screen applicants for judicial vacancies, nominate the most qualified applicants for appointment by the governor, evaluate the performance of sitting judges, recommend to voters whether judges should be retained, and conduct research related to the administration of justice in Alaska; and

WHEREAS: The Alaska Constitution provides that the AJC shall have seven members, including three attorneys appointed by the Alaska Bar Association, three non-attorneys appointed by the governor and confirmed by the legislature, and the Chief Justice of the Alaska Supreme Court, who acts as the chairperson; and

WHEREAS: Through the AJC process the Alaska Constitution created a merit-based system for appointing judges while retaining accountability to the voters, and this Alaska system is widely considered to be one of the best state judicial selection processes in the United States; and

WHEREAS: AFN does not support any amendments that would change Alaska's merit- based system for selecting judges into a partisan political process controlled by the governor and in the long term would inevitably diminish the quality and fairness of the state judiciary; and

WHEREAS: Alaska Native Tribes, tribal organizations, and individual Alaska Natives subjected to Alaska's civil or criminal judicial system are best served by an independent state judiciary, selected on merit.

NOW THEREFORE BE IT RESOLVED that the delegates of the 2014 Annual Convention of the Alaska Federation of Natives support Alaska's current system of selection and retention of state court judges; and

BE IT FURTHER RESOLVED that the Alaska Federation of Natives opposes any attempt to amend the Alaska Constitution to alter the composition of the Alaska Judicial Council to politicize the judicial selection process; and

BE IT FURTHER RESOLVED that this resolution shall be the policy of AFN until it is withdrawn or modified by subsequent resolution.

SUBMITTED BY: Bristol Bay Native Corporation, Bristol Bay Native Association, Aleut Corporation, CIRI
COMMITTEE ACTION: DO PASS
CONVENTION ACTION: ADOPT

Daniel George

From: Alison Arians <alisonarians@gmail.com>
Sent: Monday, March 23, 2015 11:32 AM
To: Senate State Affairs
Subject: SJR 3 testimony

Dear Members of the Senate State Affairs Committee:
Senator Stoltz, Senator Coghill, Senator Huggins, Senator McGuire, and Senator Wielechowski,

My name is Alison Arians. Thank you for the opportunity to testify on SJR 3.

I was born and raised in Alaska, and I am a small business owner in Anchorage. My husband and I opened Rise & Shine Bakery 8 years ago. I'm not an attorney, and I'm testifying against SJR 3.

As a small business owner, I appreciate efficiency, a limited bureaucracy, and expert advice. I agree with the way our Judicial Council works now. Adding more people to the group will add significant expense to the travel budgets of this group.

I'm comfortable with asking people with law degrees to evaluate their peers. The combination seems efficient the way it is. I respect the Chief Justice's opinion, if necessary for her or him to vote, to know whether a judge is well qualified for a job. Also, I think the citizen members on the group deserve a little more credit for being able to make good recommendations to their group, and to back them up. It's only been 16 times out of 1,149 votes when the Chief Justice sided with the attorney group against the public members—and it looks to me like the group works very well, since 99% of the time, that's not happening!

For several years I volunteered as a Court-Appointed Special Advocate. I acted as a volunteer guardian *ad litem* for children, and that's the only experience I have in front of a judge. I was impressed by the caliber of our judges then, and want to retain that kind of high quality. It's important to me that the judges making decisions about the future of our citizens are evaluated by their merit—not by their political leanings.

When I vote for the judges, I want to be able to know that the judges I vote for are well-qualified, and I believe that the Judicial Council as it stands is effective and efficient.

Sincerely,
Alison Arians
12900 Badger Lane
Anchorage, AK 99516
(907) 748-3712
alison.arians@gmail.com

PLEASE VOTE "NO "ON SJR 3

Amending our Constitution is hard. It takes agreement of 2/3rds of the House and Senate just to get the process started. That difficulty, that barrier to amendment, was intentional on the part of the drafters of our Constitution because they did not want it amended unless there was a real problem to be solved.

The drafters did not believe in the notion of "just let the voters decide." Instead, they charged the legislature with making a reasoned and informed and non-political decision as to whether the Constitution needs amendment. A vote for SJR3 would be an endorsement by you to the people that there is a serious problem with the Constitution. Can you honestly say that?

Nobody has identified any problem that SJR3 will solve. Why would we want to change the system that has worked so well? One answer I hear from a few is that the amendment will result in judges who will rule in ways more to their liking. That is problematic at best:

1. There is no way to know who will be in the legislature when judicial council members in the future are confirmed or even who they will be.
2. There I no way to know during the confirmation process how a judicial council member will vote when selecting judges to be appointed by the governor.
3. You cannot know who will apply to be a judge.
4. You cannot know who will be governor when it comes time to appoint a judge.
5. You cannot know who the governor will appoint when given a choice.
6. And you certainly cannot know how a judge will rule when ultimately appointed.

If you are inclined to vote for SJR3 because you believe that it will result in rulings more in line with your political philosophy, please remember that one of the most liberal judges in our history was the very conservative governor of California, Earl Warren, appointed to the US Supreme court by a very conservative Dwight Eisenhower.

Julian Mason 8101 White Drive Anchorage 99507 julian@ak.net

Daniel George

From: Eric McCallum <ericmccallum5@gmail.com> on behalf of Eric Mccallum <mccallum@alaska.net>
Sent: Monday, March 23, 2015 2:49 PM
To: Senate State Affairs
Subject: SJR 3

Dear Senate State Affairs Committee Members,

I own Arctic Wire Rope & Supply, an industrial supply company in Anchorage.

I am writing to encourage you to leave the Alaska Judicial Council format as is and reject SJR 3., In reading the news and talking to people who live in other states, I am constantly reminded what a model constitution Alaska has.

Our federal and state government is getting so politicized, we need to keep this one branch above the fray and for no other reason than it works amazingly well and does not need "fixing".

As a business owner I have found that merit based decisions have served me much better than popularity contests.

Please lets leave this one thing alone.

Thank you,

Eric McCallum

14100 Jarvi Dr.

Anchorage 99515

President
Arctic Wire Rope & Supply
6407 Arctic Spur Rd
(907) 529-1218 cell

Daniel George

From: Barbara Hood <middlerockraven@gmail.com>
Sent: Monday, March 23, 2015 4:03 PM
To: Senate State Affairs
Subject: Oppose SJR 3

Dear Senators,

I'm writing to urge you to oppose SJR3, which would change both the composition and confirmation requirements of the Alaska Judicial Council. This effort to amend the Alaska Constitution's Judiciary Article is unnecessary and ill-advised.

SJR3's sponsor suggests that Alaska is an outlier in its judicial selection process for the role it gives lawyers on the judicial council, which is charged with evaluating and nominating candidates for judgeships. Three members of the council are lawyers, three are members of the public, and the Chief Justice serves as the seventh member, ex officio.

The sponsor quotes a 60-year-old report by consultants to Alaska's Constitutional Convention for the notion that no other jurisdiction gives lawyers such a prominent role. Yet this view fails to acknowledge that Alaska's constitutional framers were among the first to adopt merit selection, which is widely viewed as "the best way to select the best judges." And in the many years since, a number of other jurisdictions have followed Alaska's lead. Now many states employ merit selection in some form, and several have judicial nominating commissions that are virtually identical to our own.

Under merit selection, lawyers play a vital role in ensuring that only the most competent and highly qualified members of the legal profession attain the bench. Alaskans have been well served for over a half century by the current system and efforts to change it should fail.

Thank you for your consideration.

Sincerely,

Barbara Hood
10161 Middlerock Rd
Anchorage, AK 99507
907-301-5362

Daniel George

From: Sen. Bill Stoltze
Subject: FW: SJR 3

From: Barbara L. Schuhmann [mailto:barbara@alaskalaw.com]
Sent: Monday, March 23, 2015 4:44 PM
To: Sen. John Coghill; Senate State Affairs
Cc: Sen. Bill Stoltze; Sen. Charlie Huggins; Sen. Lesil McGuire; Sen. Bill Wielechowski
Subject: SJR 3

March 23, 2015

Dear Senator Coghill:

I understand the Senate State Affairs Committee will hear testimony tomorrow morning. I am submitting this email as my testimony in opposition to SJR3.

SJR 3 proposes to amend the Alaska State Constitution's provisions on the make-up, selection and quorum requirements of the Alaska Judicial Council. Nothing needs to be fixed about the Alaska Judicial Council. And this proposal will do nothing but harm.

The Alaska Judicial Council is a unique agency. It seeks the most qualified of judicial candidates, sends nominations to the Governor, who then appoints from among those nominated.. It also undertakes to study the performance of sitting judges, to assist the electorate when it directly votes on whether or not to retain a state judge. The Judiciary is a separate branch of government. Only members of the Alaska Bar Association can represent clients before a state judge. The bar association undertakes background checks and testing of candidates before allowing a person to become a member of the bar. Members swear an oath, and must follow the rules of professional conduct.

The Constitution requires that there are 3 lawyer members of the AJC, appointed by the Alaska Bar Association, 3 public members appointed by the governor and confirmed by the legislature, and the chief justice of the Alaska Supreme Court, who only votes in case of a tie. SJR 3 seems to be aimed at the lawyer members, as it would double the number of public members, from 3 to 6, and it would require legislative confirmation of the lawyer members except for the chief justice.

I oppose expanding the number of members on the Council. Seven members is a good number for a council of this type. It is an odd number, so tie votes are less likely to occur than with SJR 3's proposed ten-member alternative. Seven is an efficient number. A council with ten members will have more problems finding a time and place to meet than a seven member council will have. Meetings will be longer, to allow all to have a voice in discussions. Meetings will be more expensive, as per diem reimbursements must be paid to more members. We need more efficiency in government, not less.

I oppose requiring legislative approval of the appointment of the Council's lawyer members. Adding a requirement of legislative approval could delay or even destroy the ability of the council to work with a full group of approved members. The legislature could hold up approval of some members. I fail to see how a legislative vote would improve the process, but I can see how it could delay and confuse it.

I oppose changing the requirement of a vote of the majority of the Council, to a vote by a minority, for approval of an action. The Constitution states the Council may act upon a concurrence of four or more of its seven members (4/7). SJR 3 would change this requirement from action by the majority of members, to allow action by a minority

of members, since only a majority (4) of a quorum would be necessary, just four out of ten votes (4/10). If the legislature refused to vote on the confirmation of some members (i.e., the lawyer members), the six public members and chief justice could meet, vote and act with a vote of only 4 of the 10 members. Requiring only a majority of a quorum could allow a minority of members to act on an issue, even if the majority opposes it and just cannot attend a particular meeting, or has not been confirmed by the legislature.

Perhaps SJR 3 recognizes how difficult it will be to get ten members to attend all meetings. Or perhaps it recognizes that it could be difficult to obtain legislative confirmation for all Council members. But these do not supply a reason to allow a minority of members to act on behalf of the Council.

The framers of the Constitution thought that attorney input would be useful to the process of selecting judges. Lawyers who have litigated with other lawyers and before judges have a pretty good idea of how smart, fair and hard working that other lawyer is. Eliminating lawyer input will not help the process and likely would hurt it.

While no human-made institution is perfect, the Alaska Judicial Council has worked well over its lifetime. It seeks to nominate the most qualified candidates to judgeships. It studies the performance of sitting judges to help the electorate in its decision whether to retain a judge or not. Proposed SJR 3 seeks to insert politics into the process of selecting members of the Council, and into the Council's process of nomination and retention of Alaska judges.

Inserting politics into the process, and hurting the efficiency and fairness of the Alaska Judicial Council, will not improve the caliber of judges in Alaska. The current system has worked well, and more efficiently and fairly than it would under SJR 3. I oppose SJR 3 and ask that it be defeated.

Thank you.

Sincerely,

-barbara

Barbara L. Schuhmann, Esq.
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907-452-8154 FAX
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Daniel George

From: Bob Groseclose <bob@alaskalaw.com>
Sent: Monday, March 23, 2015 5:31 PM
To: Sen. Bill Stoltze
Sen. John Coghill; Sen. Charlie Huggins; Sen. Lesil McGuire; Sen. Bill Wielechowski
Subject: Groseclose input re SJR 3

Dear Chair Stoltze and Senate State Affairs Committee members,

I had hoped to testify when SJR 3 was first scheduled before your committee last month. I just learned today of the rescheduled time of tomorrow. Because I will not be available at tomorrow's scheduled start time, please accept this email as my input for tomorrow's scheduled session to enable public input.

I am a past member of the Alaska Judicial Council (2000-2006). I am a current member of the Alaska Judicial Conduct Commission (2013 to present). I have practiced law in Fairbanks since 1976.

1. The current merit selection process (i.e Alaska Constitution Art. IV, sec. 8) works well and would not be improved by SJR 3.

To best assure an independent judiciary as a separate branch of government, the Alaska Constitution framers evaluated the multiple variations for selecting judges. They chose a system that rejected the election of judges and focused selection upon merit — free as much as reasonable from political considerations. For over 50 years, Alaska's merit selection process has met the framers' goals of appropriately insulating the selection of judges from partisan politics. SJR 3 threatens to politicize that process. Instead of the current 7 member composition (including 3 members appointed by the governor, subject to legislative confirmation), SJR 3 would double that number, enabling political appointees to dominate the council. SJR 3 would also require legislative confirmation of the lawyer members, who are already vetted through an Alaska Bar Association election process. This adds further politics. It also risks enabling a minority of the full council to make decisions based upon a quorum that authorizes 4 out of 10 to decide.

2. The goal is an independent judiciary insulated from political considerations.

The experiences of those states that require and enable the election of judges serve in stark contrast to Alaska's merit selection process. Alaska's selection process is touted as the model to follow, elsewhere in the country and world. While SJR 3 does not propose the election of judges, it ramps up political considerations to a level that is potentially worse. While purporting to enhance democratic principles, SJR3 instead would weaken the independence of the judiciary by enabling the state's executive (governor) greater control of judicial selection through a doubling of the council seats filled by gubernatorial appointment.

3. SJR 3 will cost the state more to implement, with less—not greater-- efficiency.

It is fundamental to all group dynamics that the greater the number of participants the greater the scheduling conflicts that need to be avoided. The greater the number, the more plane fares and per diem are required. Far from the glamour associated with such selection exercises as portrayed on "American Idol," the work of judging judicial candidates involves work. Hours, days, and weeks of it. This is all volunteer effort. The judicial council has to screen, and evaluate multiple candidates (exceeding twenty candidates in some instances for one vacancy). This involves extensive preparatory reading of resumes, background checks, references, survey input, writing samples and more. This effort is then followed by lengthy meetings that enable each of the council members the opportunity to interview each candidate. Expanding that group from 7 to 10 necessarily expands the time and expense associated with the process.

I urge you to reject SJR 3. Examine carefully the purported reasons advanced in support of SJR 3. Those reasons ring hollow. They will add cost and detract from the goal of promoting a strong and independent judiciary.

Thank you for serving our state and for your consideration of this important issue.

Bob Groseclose

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JACOB A. SONNEBORN • THOMAS V. WANG • REBECCA A. WINDT PEARSON
OF COUNSEL JULIAN L. MASON III • A. WILLIAM SAUPE

FAX SHEET

TO: Daniel George

FAX NO.: (907) 465-4928

FROM: Don McClintock

RE: Justice Not Politics

MESSAGE: Daniel, The attached documents are being sent to you on behalf of Heather Arnett. They are to be included in the committee packets for tomorrow's hearing.

DATE: March 23, 2015
NAME OF CLIENT:
CLIENT NUMBER:
NUMBER OF PAGES (including cover): 8
FAX OPERATOR: Jennifer Witaschek
IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL (907) 276-4331.

1227 West 9th Avenue, Suite 200, Anchorage, Alaska 99501
TEL 907.276.4331 • FAX 907.277.8235

ALASKA FEDERATION OF NATIVES

February 24, 2015

Sent Via Electronic Mail
Members of the 29th Alaska State Legislators

Re: Senate Joint Resolution 3, Alaska Judicial Council

Dear Legislator:

The Alaska Federation of Natives' membership – which includes 165 federally recognized tribes, 146 village corporations, 12 regional corporations, and 12 regional nonprofit and tribal consortiums that contract and compact to run federal and state programs – stands in strong opposition to Senate Joint Resolution 3, which proposes amending Alaska's Constitution to double the number of gubernatorial appointees on the Alaska Judicial Council and requiring all Council members to be confirmed by the Alaska State Legislature.

The founders of the Alaska Constitution structured the Council to insure the impartiality and independent nature of the Judiciary, a co-equal form of government with the Governor and the Legislature. The Council includes three members chosen by the Governor, three attorney members selected by the Board of Governors of the Alaska Bar Association, and the Chief Justice of the Alaska Supreme Court, who votes only to break ties. The Council conducts an exhaustive review of candidates for judgeships, receives public comment through a variety of venues and nominates the most highly qualified applicants to the Governor, who makes the final appointment.

This system has served Alaska well for over 50 years and has provided a state judiciary where Alaskans can feel confident that only the most qualified and most impartial individuals will ascend to a judgeship. Alaska has one of the least politicized state judicial selection and retention systems in the nation, one where judges are not beholden to political influence, but have a sole commitment to supporting the rule of law.

The changes proposed by SJR 3 would allow a Governor to appoint a majority of Council members and would allow the Legislature to approve all members; thus giving the Executive and Legislative branches undue influence over the Judicial branch and undermining the checks and balances that form the foundation of our democracy.

The system is not broken. It has served Alaskans well. It is for these reasons that the voting delegates to the 2014 Annual AFN Convention approved the enclosed Resolution 14-37, 'A Resolution Supporting Alaska's Current System of Selection and Retention of State Court Judges.' On behalf of AFN, I strongly urge you to oppose SJR 3.

Sincerely,
ALASKA FEDERATION OF NATIVES

Julie Kitka
President

Alaska Federation of Natives
2014 Annual Convention
Resolution 14 - 37

TITLE: A RESOLUTION SUPPORTING ALASKA'S CURRENT SYSTEM OF SELECTION AND RETENTION OF STATE COURT JUDGES

WHEREAS: The Alaska Federation of Natives (AFN) is the largest statewide Native organization in Alaska and its membership includes 165 federally-recognized tribes, 146 village corporations, 12 regional corporations, and 12 regional nonprofit and tribal consortiums that contract and compact to run federal and state programs; and

WHEREAS: The mission of AFN is to enhance and promote the cultural, economic, and political voice of the entire Alaska Native community; and

WHEREAS: The Alaska Judicial Council (AJC) is an independent citizens' commission established by the Alaska Constitution to screen applicants for judicial vacancies, nominate the most qualified applicants for appointment by the governor, evaluate the performance of sitting judges, recommend to voters whether judges should be retained, and conduct research related to the administration of justice in Alaska; and

WHEREAS: The Alaska Constitution provides that the AJC shall have seven members, including three attorneys appointed by the Alaska Bar Association, three non-attorneys appointed by the governor and confirmed by the legislature, and the Chief Justice of the Alaska Supreme Court, who acts as the chairperson; and

WHEREAS: Through the AJC process the Alaska Constitution created a merit-based system for appointing judges while retaining accountability to the voters, and this Alaska system is widely considered to be one of the best state judicial selection processes in the United States; and

WHEREAS: AFN does not support any amendments that would change Alaska's merit- based system for selecting judges into a partisan political process controlled by the governor and in the long term would inevitably diminish the quality and fairness of the state judiciary; and

WHEREAS: Alaska Native Tribes, tribal organizations, and individual Alaska Natives subjected to Alaska's civil or criminal judicial system are best served by an independent state judiciary, selected on merit.

NOW THEREFORE BE IT RESOLVED that the delegates of the 2014 Annual Convention of the Alaska Federation of Natives support Alaska's current system of selection and retention of state court judges; and

BE IT FURTHER RESOLVED that the Alaska Federation of Natives opposes any attempt to amend the Alaska Constitution to alter the composition of the Alaska Judicial Council to politicize the judicial selection process; and

BE IT FURTHER RESOLVED that this resolution shall be the policy of AFN until it is withdrawn or modified by subsequent resolution.

SUBMITTED BY: Bristol Bay Native Corporation, Bristol Bay Native Association, Aleut Corporation, CIRI
COMMITTEE ACTION: DO PASS
CONVENTION ACTION: ADOPT

Judicial change likely to backfire: Interior senator's measure would lead to more partisanship, not less

Posted: Sunday, February 22, 2015 12:01 am

Fairbanks Daily News-Miner Editorial

For the second session in a row, Fairbanks Sen. Pete Kelly has introduced a resolution that would fundamentally alter the Alaska Judicial Council. The low-profile council is in charge of recommending candidates for judgeships within the state, as well as making recommendations to voters about whether judges up for retention should stay in their posts. Sen. Kelly's resolution would change the way Judicial Council nominees are picked in a manner he says would make the process more democratic and accountable. Realistically, however, the likely outcome of Sen. Kelly's resolution would be a politicization of the branch of government still largely unaffected by partisanship. Alaska neither needs nor can afford that outcome.

Currently, the Alaska Judicial Council is made up of three members appointed by the governor, three members selected by the Alaska Bar Association and — as a tiebreaker — the Chief Justice of the Alaska Supreme Court. Sen. Kelly's resolution would double the number of gubernatorial appointees, meaning two-thirds of the members of the council would be appointed and confirmed by those holding elected office. In Sen. Kelly's view, this would correct potential abuses of power by council members nominated by the Alaska Bar Association, as those members could always be outvoted by those appointed and confirmed by the governor and Legislature.

In practice, however, it is the elected members of our government and not the bar association who have been far more apt to consider nominees through a partisan lens.

Legislators at the state and national level complain of "activist judges," but it is they who are most prone to consider — even demand to know — how judicial candidates would vote on hot-button political topics rather than finding candidates who would rule according to judicial precedent and existing law. That's judicial activism of the worst sort. And increasing the sway of those partisan considerations would only erode the impartiality of the judicial branch of government.

As to the notion that the bar association's nominees could somehow thwart the will of the people, there is no reason to believe that has been the case in the past or will be in the future. Bar association nominees are chosen through a detailed and thoroughly nonpartisan survey process of Alaska's lawyers. The state's legal professionals have little stake in partisan political outcomes; in choosing council members, they opt for those who will manage the court's business well, consistently and impartially.

And though Sen. Kelly argues that splits between the governor's and the bar association's appointees on the council have increased in recent years, such splits are rare — and when they have happened, it has been on alternate candidates for posts when the council's members had already selected one or more candidates that had stronger support.

Simply put, Sen. Kelly's resolution — though the intent of its author may well be noble in seeking more public accountability for members of government — is looking to fix a problem that doesn't exist, in a way that likely would create the issue it seeks to address. As it stands, the Alaska Judicial Council has done excellent work selecting candidates for a well-qualified, impartial judiciary that serves the state well. There is no need for the state to make that process more partisan by doubling the number of political appointees on the council.

More about *Fairbanks*

- ARTICLE: Fairbanks Looking Back — Feb. 25, 2015
- ARTICLE: Fairbanks Births — Feb. 23, 2015
- ARTICLE: Appreciating lesser-known figures of history
- ARTICLE: America Saves Week: Tips, tricks for building up savings
- ARTICLE: Celebrate pot legalization responsibly

More about *Alaska Judicial Council*

- ARTICLE: Ending daylight saving time, PFD protection among bills pre-filed by Alaska legislators
- ARTICLE: Huggins defends committee assignment process
- ARTICLE: Alaska council accepting applications for judgeship
- ARTICLE: Council announces Bethel court nominees

More about *Sen. Pete Kelly*

- ARTICLE: Sen. Kelly left out of state election pamphlet after missing entry deadline

Posted in Editorials on *Sunday, February 22, 2015 12:01 am.* | Tags: Fairbanks, Alaska Judicial Council, Sen. Pete Kelly, Judgeships

HOW TO GET INTO PRINT

Guidelines

The Daily News-Miner encourages residents to make themselves heard through the Opinion pages. Readers' letters and columns also appear online at newsminer.com. Contact the editor with questions at letters@newsminer.com or call 459-7574.

Community Perspective

Send Community Perspective submissions by mail (P.O. Box 70710, Fairbanks AK 99707) or via email (letters@newsminer.com). Submissions must be 600 to 750 words. Columns are welcome on a wide range of issues and should be well-written and well-researched with attribution of sources. Include a full name, email address, daytime telephone number and headshot photograph suitable for publication (email jpg or tif files at 150 dpi.) You may also schedule a photo to be taken at the News-Miner office. The News-Miner reserves the right to edit submissions or to reject those of poor quality or taste without consulting the writer.

Letters to the editor

Send letters to the editor by mail (P.O. Box 70710, Fairbanks AK 99707), by fax (907-452-7917) or via email (letters@newsminer.com). Writers are limited to one letter every 30 days. All letters must contain no more than 350 words and include a full name (no abbreviation), daytime and evening phone numbers and physical address. (If no phone, then provide a mailing address or email address.) The Daily News-Miner reserves the right to edit or reject letters without consulting the writer.

EDITORIAL

Preserve separation of powers

The separation of powers sounds like a dusty old concept. The first time any of us read about it is in history or government class, usually in the context of the writing of the Constitution, something that happened more than two centuries ago.

But it's a very real, living idea. It comes up when we debate whether the president should continue waging war in foreign countries despite Congress never having voted on the question. Separation of powers, as we know it, bestows Congress with the authority to declare war, after all. The president is tasked with waging it.

The separation of powers also has been roiling social media lately as various wags debate whether, or to what degree, Congress should be doing things like inviting foreign heads of state to speak, or sending letters to countries with whom the president and other international heads of state are actively negotiating.

Separation of powers is neither an archaic nor arcane concept.

And its implications are seen on a much more local level, too. We listened with interest to a presentation at the Greater Wasilla Chamber of Commerce meeting Tuesday from a group of people opposed to Senate Joint Resolution 3, which is currently making its way through the Alaska Senate, that would drastically change the way judges are appointed in Alaska.

To read a full account, see the story on page A1 of today's Frontiersman.

Here's a quick recap: The Alaska Judicial Council, a body made up of three attorneys appointed by the Alaska Bar Association and three non-attorneys appointed by the governor, vet judge applicants and forward a list of candidates for the governor to appoint to vacancies.

This has been the process for as long as Alaska has been a state. It's in the state constitution. That's why the resolution in the Senate doesn't change law so much as call for a vote of the people on whether to change it.

Those changes include adding three more non-lawyers and requiring that the attorneys the bar association picks be confirmed by the Legislature.

We oppose this move for two reasons.

First, we want our judiciary to be free of politics. Stacking the council with three more political appointees, to our mind, would whittle away at an independent judiciary.

One need only look to states where judges are elected to see why politics and the

Donald McClintock
6525 Michigan Blvd.
Anchorage Alaska 99516

March 23, 2015

Via Electronic Mail: senate.state.affairs@akleg.gov
Senate State Affairs Committee

Re: SJR 3

Dear Senators:

As a long time business attorney in Alaska, I urge you not to advance the committee proposal for SJR 3 out of committee. Our system works. For over thirty years I have seen prosecutors, government attorneys, public defenders and private attorneys go through the grueling and transparent Judicial Counsel process. Invariably, those nominated for the governor's consideration had earned the respect of the bar without regard to their religion, ethnicity or political affiliation. Equally significant, once these attorneys assumed the robes of their office, the vestiges of their past disappeared. We have truly cultivated a culture of an independent impartial judiciary and our judicial selection process is an integral part of that culture.

Do I disagree with some of the results from the courts? Of course, and sometimes, not always I have been vindicated on appeal. But I have never walked out of court with the concern or belief that my case was lost because my adversary or his client had an affiliation with the legislature or the governor's office that somehow steered the selection process so the judge was beholden to any constituency or to any predetermined bias or cause.

Constitutional Convention Delegate Ralph Rivers acknowledged as much when our delegates overwhelmingly rejected legislative confirmation of the Bar Association delegates. In speaking against the amendment, he said:

> The purpose of the draft as now written is to have a non-partisan selection of these lawyer members, and the minute you adopt something like this, you are making a partisan proposition out of it. We want that to carry through to a non-partisan selection of judges, so I think our thinking is quite clear."

Alaska is recognized nationally for its highly successful judicial selection process free of partisanship. Our system of non-partisan merit selection combined with retention elections promotes the best of both worlds—non-partisan merit selection coupled with pure democratic accountability—a vote of the people. The system works—don't break it. Let's be proud of it.

Sincerely,
/s
Donald McClintock

Daniel George

From: Beth Adams <bethmuir54@gmail.com>
Sent: Monday, March 23, 2015 10:00 PM
To: Senate State Affairs
Subject: NO ON SJR 3

Keep politics out of our judiciary! The system we have has been working for over 50 years, there is NO reason to change it except to try to politicize it. Back to work on fiscal issues!

Beth Adams

Sent from my iPhone

Daniel George

From: SCOTT MCMURREN <zoom907@me.com>
Sent: Monday, March 23, 2015 10:19 PM
To: Sen. Bill Stoltze
Cc: Senate State Affairs; Sen. Kevin Meyer; Sen. Berta Gardner; Sen. Pete Kelly; Christy McMurren
Subject: SJR3

Mar. 23, 2015

Sen. Bill Stoltze
Alaska State Capitol
Juneau, AK 99801
(via email)

Re: SJR3

Dear Sen. Stoltze:

Thank you for your interest in the Alaska Judicial Council. The Council has served Alaskans very well since Statehood. Senator Kelly's proposed constitutional amendment, SJR3, is a solution looking for a problem. It is truly a weapon of mass distraction. I oppose the resolution. Further, I would admonish you to instead work on a budget within our newly-limited means in the midst of the oil-price crash.

Your attempt to "pack" the council with appointees who pass your political litmus test is a blatent attack on an independent judiciary.

Your bold move to grab the power to confirm lawyers on the council is another affront to an independent judiciary.

Senator Kelly's populist ruse in calling for a "vote of the people" really misses the mark. The people would be votiing to take procedural power from one branch of government to another. The real "vote of the people" comes when it's time to retain judges.

This strategy is reminiscent of when President Franklin Roosevelt tried to pack the U.S. Supreme Court with as many as 15 justices in order to get more favorable rulings. That was in 1937. The Judicial Procedures Reform Bill ultimately failed. It is my sincere and earnest desire that your SJR3 meets with a similar fate.

Wish Best Wishes,

Scott McMurren
2626 Cottonwood St.
Anchorage, AK 99508
(907)727-1113
zoom907@me.com

cc: Sen. Kevin Meyer, Sen. Berta Gardner, Sen. Pete Kelly, Senate State Affairs Committee

Daniel George

From: Brad Owens <bowensak@gmail.com>
Sent: Monday, March 23, 2015 6:49 PM
To: Senate State Affairs
Sen. Bill Wielechowski
Subject: SJR 3

Follow Up Flag: Follow up
Flag Status: Flagged

I write to urge you to oppose SJR 3. The reasons are many: first, the current merit system for selecting and retaining judges is a model resulting in a genuinely independent and high quality judiciary. There is no good non-political reason to change this system created by the Alaska founding-fathers. Second, the proposed change creates a serious issue involving the separation of powers. There is no valid reason to create a situation that dramatically impacts the careful system of checks and balances between the three branches of government and is likely to result in years of litigation. Third, it will negatively politicize courts in Alaska by making judges beholden to the people and organizations that support them, rather than the principles of law under the Constitution.
Please reject this effort to change the Alaska Judicial Council as proposed by SJR 3.
Brad Owens

Sent from my iPhone

Daniel George

From: Bud Carpeneti <budcarpeneti@gmail.com>
Sent: Tuesday, March 24, 2015 2:36 AM
To: Senate State Affairs
Subject: Attn: Chairman Bill Stoltze
Attachments: image.png; ATT00001.txt; image.jpeg; ATT00002.txt; image.jpeg; ATT00003.txt; image.jpeg; ATT00004.txt; image.jpeg

Hon. Bill Stoltze
Chair, Senate State Affairs Committee

Dear Chairman Stoltze:

I would like to testify against SJR 3, due to be heard by your committee on March 24, but am unable to do so because I am out of the state. I would appreciate it very much if your staff might make this letter and its attachment a part of the committee's record of its hearing.

My position on this legislation is informed by my service for over 30 years as an Alaskan judge, 17 on the trial court as a superior court judge and over 14 as a supreme court justice (including the last three as chief justice). I also served twice on the Alaska Judicial Council, the first as a lawyer representative in the early 1980s and the second as chair ex officio when I was chief justice from 2009 to 2012. By way of perspective, when I retired I had served as a judge for slightly over 60% of the total time that Alaska had been a state.

I oppose SJR 3, as is more fully set out in the attached letter that I wrote to Sen. Coghill and the members of the Senate Judiciary Committee last year in regard to the similar SJR 21, and the attached "My Turn" piece that I wrote for the Juneau Empire in regard to the same legislation, for several reasons: (1) Alaska currently enjoys the best judicial selection/retention system in the country, which has worked extremely well for over 60 years; (2) no problem justifying a change in our Constitution has been demonstrated that would justify changing a system that is the envy of other states and towards which other states are moving; (3) SJR 3 would greatly complicate the meeting proccesses of the Council, risk the cohesive functioning of the Council, increase costs to the state, and risk the quality of the Council's work. My support for all of these propositions is set out at some length in the two attachments. (And I would emphasize that, while the attachments are from last year, the statistics concerning council votes, etc., have remained consistent over the past year.)

Finally, because the attachments do not address the question of legislative confirmatiion of attorney members of the Council, I would add this note: It is a bad idea, because it directly contravenes the constitutional bedrock principles of separation of powers between co-equal branches of government and the independence of the judiciary. The framers considered and rejected the notion of legislative confirmation of Alaska Bar Association appointees to the Council, correctly recognizing that it would introduce political considerations improperly at the merit stage of the process. As I am away from Juneau (and my files on this issue), I cannot lay my hands on the statement from George McLaughlin, the chair of the Committee on the Judiciary of the Alaska Constitutional Convention, but he said during the proceedings that legislative confirmation was a bad idea precisely because it would re-introduce the notion of "political correctness" at the stage designed to look only to merit.

Thank you for considering this letter and its attachments, and for all of your past courtesies.

Sincerely,

Walter (Bud) Carpeneti

634 Seward St.
Juneau, AK 99801
February 14, 2014

Honorable John Coghill and Members of the Senate Judiciary Committee
State Capitol
Juneau, Alaska

Re: SJR 21

Dear Chairman Coghill and Committee Members:

I am writing in opposition to SJR 21. I am sorry not to be able to present my views in person, but I will be traveling away from Juneau during today's hearing and will not return until after Monday's hearing. I will attempt to attend any future hearings so as to be able to respond to any questions that legislators may have about the views I express in this letter.

I oppose SJR 21 both because no need to amend Alaska's Constitution to change the makeup of the Judicial Council has been shown and because the proposed change has numerous problems. Below I set out the reasons for these conclusions.

No need demonstrated to change the Constitution. Alaska's Constitution is widely acknowledged as one of the best state constitutions in America. Before beginning the process of amending it, there should be a clearly demonstrated need to do so. But no reason appears to undertake SJR 21's changes. I could not find a sponsor statement in the legislative materials, but presumably the sponsors feel that in some respect the Judicial Council has not functioned efficiently or effectively. But there is no evidence of such failures. In its work nominating candidates to the governor for judicial appointment, and reviewing judicial performance and making recommendations to the voters for or against retention of judges, the Council has — along with the governor and the voters — helped produced a judiciary that throughout Alaska's statehood has been free of corruption, scandal, judicial intemperance, and the other ills that have been produced by selection systems not based on merit.

I believe that the Framers' vision in constructing our merit selection process was extraordinary in balancing the competing demands. In the first phase, the process looks only to merit and competence: The Alaska Judicial Council seeks to find the best candidates based on character, intellectual capacity, faithfulness to the

rule of law, fairness, temperament, integrity, and the like. Applicants passing the first screen are then sent to the governor for his or her selection. This second phase recognizes that elections have consequences, and that the people's will as expressed in the gubernatorial election is properly reflected in the general makeup of the bench. Finally, the voters have the responsibility at regularly-scheduled elections to pass on the performance of judges.

At the critical first phase, the Framers weighed the value of having those most intimately knowledgeable about the attributes of the candidates — that is, the lawyers who daily work with them, see them perform, litigate with and against them — balanced equally with members of the general public. The Framers correctly understood that no one would know better the true strengths and weaknesses of judicial candidates and no one would have a greater interest in insuring that only the very best candidates — the "tallest timber" in the words of one delegate — would make it through to the governor for final consideration. The sponsors of SJR 21 have not demonstrated why this delicate and successful balance should be upset at this time. I believe that it should not be.

It may be that they believe that lawyers have dominated the process and that the general public's representatives must be increased. There is no evidence for such a belief, and it is not true. I have served twice on the Council, in the early 1980's as one of the lawyer representatives and from 2009 to 2012 as chair ex officio. Both times the public's representatives — people like Jack Longworth from Petersburg, Bob Moss from Homer, Ken Brady from Anchorage, Tena Williams from Ketchikan, Ken Kreitzer from Juneau, and others — were strong and articulate voices for the positions that they held. And beyond this anecdotal evidence, a review of the voting patterns from the perspective of lawyers' votes and public members' votes shows that the instances in which the two "sides" split evenly (that is, public members vote identically and in opposition to the lawyers) almost never occurs: it has happened only 15 times in 1,136 votes in the 30 years from 1984 to 2013, the period for which the data is available. With the public members and lawyers evenly opposing each other on one percent of the total votes in 30 years, there is no statistical basis to presume that the lawyers somehow dominate the process.

I hope that the Committee demands a strong showing that there is a problem with the balance struck by the Framers before it considers approving this legislation. Our Alaska Constitution has served us well in judicial selection since statehood, and the possibility of changing it should not be entertained lightly.

<u>SJR 21 creates numerous problems.</u> I set out below some of the problems that

SJR 21 would create. This list is not exhaustive, because I have been aware of the proposed legislation for only a few days.

1. SJR 21 would complicate the meeting process. The six regular members of the Judicial Council are all volunteers. They are entirely unpaid (not even receiving honoraria, even though the members of many other state boards and commissions receive such honoraria). They meet frequently (the Council averaged about 15 meeting days per year during the 2009-12 period with which I am most familiar). Co-ordinating the schedules of six busy persons was difficult. Adding 10 members would introduce an unwelcome level of complexity to the process.

2. SJR 21 would risk the cohesive functioning of the Council. It is not difficult to imagine that the Council would be forced to meet in panels not comprising all of the members. It would then lose the cohesion that has characterized its work since statehood, in which all of the members participate in all of the decisions, producing an even and tempered quality to the Council's work.

3. SJR would increase the costs to the state. While it is true that Council members receive no financial compensation for their work, travel and related costs would increase substantially.

4. SJR 21 would risk the quality of the work done by the Council. The burden on Council members is terrific: They must review hundreds and, at times thousands, of pages of material for each new judgeship and for the retention evaluations. (Before switching to digital information delivery, it was not uncommon for the "binders" for a given session to total a foot or more in height when placed on a desk.) Finding the persons willing to make this great of a commitment over a sustained period of years will not be easy. The experience of the Alaska Judicial Council has been of a committed group of persons willing to do the hard work necessary. Tripling the size of the Council may result in a lowering of the quality of its work.

I hope that I have conveyed the depth of my concern about SJR 21. I believe firmly that Article IV is a true gem of our Constitution, and that the Alaska Judicial Council has functioned efficiently and effectively in helping to provide Alaskans with

a judiciary of which they are justifiably proud: dedicated men and women who follow the law without fear or favor, who strive to be fair and impartial, and who leave behind their political beliefs when deciding cases. I worry about tinkering with that system when no reason to do so has been shown and when obvious problems attend the attempt to tinker.

Thank you for considering my views. I am sorry not to be able to appear personally before your Committee, and I would welcome the opportunity to answer your questions in the future should it present itself.

Sincerely,

Walter L. Carpeneti

Walter L. Carpeneti

2014

My Turn: Judicial selection process doesn't need fixing

Posted: April 9, 2014 - 12:00am

BY WALTER L. (BUD) CARPENETI

FOR THE JUNEAU EMPIRE

Pending before the Legislature are companion proposals, SJR21 and HJR33, to amend our constitution to increase the size of the Judicial Council, the body that nominates people to the governor for appointment as judges.

The governor now names three of the six regularly-voting members, but these proposals would let the governor name an outright majority. It is a bad idea that the Legislature should reject. Here's why:

First, our constitution, which is widely recognized as one of the best in America, is working well regarding judicial selection. We have a merit selection system, in which a non partisan council (the Judicial Council) nominates candidates based on merit. The governor then appoints from the group nominated. Throughout Alaska's history our judiciary has been free of corruption, scandal, judicial intemperance and other ills that have been produced by systems in which political considerations play a greater role. Our system is not broken; it does not need fixing.

Second, our constitution carefully balances merit in the first phase. The Judicial Council looks for the best candidates based on character, intellectual capacity, fairness, faithfulness to the rule of law, temperament, integrity and the like, when the governor chooses from among the candidates nominated. Giving the governor the power to name the majority of the Council would risk making purely political considerations – for example, loyalty to a particular governor and his or her political goals – the most important factor in judicial selection. This is a sure road to destruction of judicial independence.

Third, backers of the constitutional amendment claim that lawyers "dominate" the council because half of the regularly-voting members are lawyers, and a fourth, the chief justice, votes to break tie votes (four votes are needed to nominate a candidate). But the evidence rejects such a claim.

Records of Judicial Council voting go back to 1984, and they show that in 1,136 votes over that 30-year span, the council split evenly between the lawyers and the non-lawyers on only 15 votes -- about 1 percent of the time. This hardly suggests lawyer domination. Moreover, the constitutional framers included lawyers on the Council because the framers correctly understood that no one would know better the true strengths and weaknesses of judicial candidates and no one would have a greater interest in ensuring that only the best candidates would make it through to the governor for final consideration. Backers also claim there should be more rural representatives to the council, but their proposals require absolutely nothing in this regard. Moreover, the governor already has the power to appoint rural representatives, and the constitution requires geographic representation to be taken into account in appointments. "Rural representation" is a sham argument.

Finally, the proposals to increase the size of the council creates numerous problems. They would complicate greatly the meeting process of an all-volunteer, unpaid group that devotes several weeks (in meeting and travel time) each year. They risk the cohesive function of the council because increasing the size leads to the increased possibility of the council working in panels or without a full complement of members at each meeting. They would risk the quality of the work done by the council – members review hundreds, and at time thousands, of pages for each judgeship evaluation. Finding people willing to make this great a commitment over a period of years will be made only more difficult by increasing the size of the group.

Because our constitution has produced a fair and impartial judiciary, because it protects all Alaskans in ensuring judicial independence, and because the arguments for changing the Constitution lack merit, the Legislature should reject SJR21 and HJR33.

• Walter L. (Bud) Carpeneti served as the Chief Justice of the Alaska Supreme Court from 2009-12.