ALASKA STATE LEGISLATURE
JOINT MEETING
HOUSE JUDICIARY STANDING COMMITTEE
SENATE JUDICIARY STANDING COMMITTEE
September 30, 2004

TAPES 04-73, 74, 75, 76

MEMBERS PRESENT

SENATE JUDICIARY

Senator Ralph Seekins, Chair
Senator Gene Therriault
Senator Johnny Ellis
Senator Hollis French

HOUSE JUDICIARY

Representative Lesil McGuire, Chair
Representative Tom Anderson, Vice Chair
Representative Jim Holm
Representative Dan Ogg
Representative Ralph Samuels
Representative Les Gara
Representative Max Gruenberg

MEMBERS ABSENT

SENATE JUDICIARY

All members present

HOUSE JUDICIARY

All members present

OTHER MEMBERS PRESENT

Senator Thomas Wagoner
Senator Lyda Green

COMMITTEE CALENDAR

^OVERVIEW: JUDICIAL SELECTION PROCESS IN ALASKA
Invitees:
Alexander Bryner, Chair, Alaska Judicial Council and Chief

Justice, Alaska Supreme Court
Judge Tom Stewart, retired
Mr. Larry Cohn, Executive Director, Alaska Judicial Council
Mr. Bob Groseclose, Alaska Judicial Council member
Mr. Doug Bailey, Alaska Judicial Council member
Ms. Gigi Pilcher, Alaska Judicial Council member
Mr. Jonathan Katcher, President-elect, Alaska Bar Association
Ms. Sidney Billingslea, Alaska Trial Lawyers' Association
Mr. Scott Nordstrand, Deputy Attorney General, Civil Division, Department of Law (DOL)
Mr. Michael Corey, Anchorage civil attorney

ACTION NARRATIVE

TAPE 04-73, SIDE A [SENATE JUD TAPE]

CHAIR RALPH SEEKINS called the joint meeting between the Senate Judiciary Standing Committee and the House Judiciary Standing Committee to order at 9:12 a.m. He announced a discussion of the judicial selection process in Alaska.

CHIEF JUSTICE ALEXANDER BRYNER introduced Eleanor Andrews and Bill Gordon, non-attorney members of the Judicial Council, and Douglas Bailey, Robert Groseclose, Susan Orlansky and Gigi Pilcher, attorney members. He said that the Alaska judicial system is regarded as one of the best in the nation, but it did not happen by accident. The Alaska constitution established the Alaska Judicial Council (AJC) as an independent body of six people that selects nominees on the basis of merit. He reviewed the rules for selection to the council and how to easily access its website. He said the criteria used for applicants are professional competence, integrity, fairness, judicial temperament and suitability of experience. The minimum qualification every judicial applicant needs is to be a good lawyer. A bar poll is conducted and written recommendations and comments from judges, other attorneys and previous employers are solicited; a written sample from the applicants is scrutinized as well as a statement of their views and interests. Each applicant has a complete background and employer verification check. The results of this system are evaluated by an independent statistical contractor, who makes the data available to the council members who can then use it to spot irregularities. Background checks are done for conflicts of interest and financial and litigation histories. The most important two parts of the council's consideration are the personal interviews and the public comments it solicits, which need to be expanded, especially among the larger populations.

He emphasized the need for the council to protect the confidentiality of people who report information about candidates based on personal knowledge and application information that contains sensitive personal and family information that goes beyond disclosure requirements of the Public Records Act.

CHIEF JUSTICE BRYNER related that one of three frequently voiced concerns is that the judicial selection process is dominated by the bar. One theory is that the council consists of three non-judicial members, three bar members and a chief justice, which could result in a possible 4 – 3 dominant vote for the bar's interests. He urged the committee to talk to council members and get their opinions. However, the council has rarely split 3 – 3 along attorney/non-attorney member lines. The second theory of bar domination is that attorneys have a "superior intimidation factor" that allows them to dominate the council. However, he said, "I just don't think that's there – if you ask the people who know – and they are the public members of the council, you won't find much support for that proposition."

The second area of criticism is that the selection process is dominated by the bar poll; however, it's hard to start the selection process without knowing how the bar regards an attorney. The important thing to remember is that the poll is just a starting point. Also, non-bar members are normally not impressed by attorney credentials and look at other attributes to differentiate between qualified applicants.

The third criticism is that because the judicial council focuses on selecting the most qualified applicants and because the constitution requires it to nominate only two applicants, an artificial goal is set for the number of applicants. However, he does not know of any time the council has ever had a conscious objective of only nominating the minimum number of candidates and nothing indicates a pattern of establishing a number. This historical record of the voting process shows all the applicants who applied, who were submitted and selected.

> In most cases more than the minimum number of names were submitted. In some cases, all of the applicants were submitted. In a few cases, only the minimum number of names go. There's just no pattern that indicates the existence of any established criteria.

CHIEF JUSTICE BRYNER said further:

> So, can the system be improved? I think it can. I think we have a great system; I think it does a great job. I think it's a leader in the nation, but like any system, I think it can be improved and I think that is a crucial component of the council's role. The constitution tells the council to select the most qualified applicants according to rules it adopts. We've adopted the rules and because the constitution gives us the obligation of adopting and enforcing rules that work, it's our responsibility, I think, to ride herd over those rules to make sure that they do what they're supposed to do and to improve them if we think they can be improved.... I very strongly favor making sure the council does what it's supposed to do and in that respect, I think the council recognizes that it has an obligation to listen to all sectors of the community – to both the public at large and to all branches of government – to hear from them and invite their views.... I'm always ready to consider ways to make it better, but I think that both I and the council will be very reluctant to respond to demands that we change the process to be something other than what the constitution requires.

REPRESENTATIVE SAMUELS asked if the council interviews all applicants or if the bar poll uses a bit of a screening process.

CHIEF JUSTICE BRYNER replied that the council typically interviews all applicants, but there are no duplicate interviews for simultaneous applications or when there is a new position in a short period of time, like a month, and membership has not changed.

REPRESENTATIVE RALPH SAMUELS asked why a bar poll rating would change for an applicant who applies in different districts or at a different time.

CHIEF JUSTICE BRYNER replied that results historically have been fairly consistent. However, from community to community, it's easy for results to change. More regional attorneys reply when an applicant is from their region.

REPRESENTATIVE SAMUELS asked him if that was viewed as a problem.

CHIEF JUSTICE BRYNER replied that statistics compiled from the poll indicate whether a candidate is strong or not. If candidates generate strong local support and very weak support otherwise, all of that is apparent in the final statistics.

CO-CHAIR LESIL MCGUIRE asked how the public could become more involved in the selection process.

> Is it appropriate for them to participate in the initial polling – those of them who have been before judges in civil cases? Is it appropriate to poll business and community leaders or is it, in your opinion, more a matter of making the public commentary process more open or the public more aware of it?

CHIEF JUSTICE BRYNER responded that it's a complicated issue and all of the legitimate approaches need to be taken. The public needs to become more involved in the initial evaluation of applicants on a more regular basis than what happens now.

TAPE 04-73, SIDE B

CHIEF JUSTICE BRYNER explained that once a person has been in the system, comments are solicited from the people they work with - like attorneys, social workers, jurors and police officers – as part of the retention bar poll. He thought the public had to become more educated about the importance of government as a whole.

SENATOR JOHNNY ELLIS said he thought we had a great selection process and asked what the "tipping point" is between qualified and highly qualified applicants.

CHIEF JUSTICE BRYNER replied that he wasn't the best person to ask since he hadn't had to break a vote but, if he did, he would look at judicial temperament, integrity, fairness, etc. When the interviews are done, the council deliberates on the people as a whole much like a jury and tries to arrive at a consensus on what people stand out as the best qualified in the group. Factors that come into that are the location of the judgeship and the strength of the competition. He didn't think that process could be mechanized.

REPRESENTATIVE LES GARA asked him to explain why someone would be nominated for one judgeship but not for another and if someone's name was submitted once, should it be sent up all the time.

CHIEF JUSTICE BRYNER replied that his prior responses addressed that issue somewhat, but a particular candidate in Kodiak had extremely strong ties to the community and a large segment of it supported him and a number of other candidates. It was obvious that the community's high regard for him had a tremendous impact on the council. In another community where the competition is different, the Kodiak applicant would not have the same ties or the same support. The level of judgeship matters, too. You have to have more experience to be on the superior court and handle the complicated jurisdiction cases it gets compared to less complex cases in a district court.

REPRESENTATIVE SAMUELS asked if someone who is already a judge would have a leg up on everyone else if he applied for a transfer to another office since he had already qualified to be a judge.

CHIEF JUSTICE BRYNER replied that he would have to go through the same process as everyone else to move to another judgeship. However, the Supreme Court might have the authority to transfer district court judges within judicial districts on a temporary basis. The council's goal is to pick the best from among the qualified applicants for a particular position.

REPRESENTATIVE JIM HOLM asked if public advocates (guardians ad lidem) acting as trustees for senior citizens are included in the retention interviews.

CHIEF JUSTICE BRYNER answered that he thought they were.

An unidentified person was sure they are included in the surveys.

REPRESENTATIVE HOLM asked if the council would move an applicant from qualified to most qualified status based upon whether or not he was popular with the public.

CHIEF JUSTICE BRYNER replied that the survey is not a popularity poll and explained his experience is that public people describe real life experiences they have had with applicants and that they are picked on the basis of competence and integrity.

REPRESENTATIVE HOLM said that another concern is that criminal defense attorneys are nominated more than prosecutors.

CHIEF JUSTICE BRYNER responded that hasn't been the case in his experience.

REPRESENTATIVE HOLM said another concern is that the arduous judicial nomination process has discouraged people from applying for judgeships.

CHIEF JUSTICE BRYNER agreed that caution was needed in making the process too onerous for applicants, but there have been a large number of judicial applicants in the last few years. However, the more judgeships that are open in a short span of time, the harder it is to get a consistent pool of really qualified applicants to pick from. Alaska has grown tremendously over the last 30 years and judges are now aging and retiring.

CO-CHAIR MCGUIRE said she understands the reasons behind anonymity and asked if there are sanctions or penalties against block voting and deliberate misrepresentation of an applicant's character; and are there oaths or obligations that a lawyer takes when filling out an application? She was also concerned that the poll is narrowed to a small group of people in Alaska.

> The way you do it for retention seems more reasonable to me because these are folks who represent a broader cross-section of our state – that have had contacts.... There are folks in our community who have talked about this – that they're concerned that there have been statements made about them that were done for political reasons and done without merit.

CHIEF JUSTICE BRYNER responded that each member of the council would have a different take on that issue, but he thought the best way to guard against block voting is to have a poll in which it can be seen happening - and then it can be ignored. Regarding misrepresentation, comments are usually subjective and if they are unsigned or vague, not much attention is paid to them. Comments have more weight if they are signed by reputable people. Serious allegations are always investigated for merit.

> If there are misrepresentations by bar members, I think that apart from whether there is any criminal or civil process or sanction that can be applied to it – that would, I think be a reportable breach of the professional conduct and would be reported to the bar association.

CO-CHAIR MCGUIRE responded:

That's one of the main arguments that's made in the article that Representative Samuels was referencing by Kevin Clarkson. It takes a brave person sometimes in the legal community to come forward and point out – just like it takes a brave person in the legislative community to come forward sometimes and say that maybe a process that's been in place for years and years and years might have some things about it that could be improved. One of the points that he makes is that he really tries to ask himself if it's based on the person's true performance and not based on their political preferences or biases.

REPRESENTATIVE MAX GRUENBERG said he is concerned that it is possible for the legislature to divest the judicial council of any role in the nomination of appellate court judges, who hear 99 percent of the criminal appeals, and district court judges, who hear far more cases than the superior court judges, while supreme and superior court judges have the internal protection of the constitution.

I want to make sure the judicial council remains involved constitutionally – a constitutionally protected mandate over the nomination of those two types of judges just as they do over the supreme court justices and superior court judges - so that the legislature couldn't go off on its own and divest the judicial council of any role in the nomination of those two types of jurists.

CHIEF JUSTICE BRYNER replied as chair of the Judicial Council that:

The constitution creates the superior court as the trial court of general jurisdiction and creates the supreme court. It gives the legislature power to create other courts and the legislature has, in fact, created the district court, a limited jurisdiction trial court and the court of appeals to hear appeals of first instance in all criminal cases. The legislature, at the same time has decided to subject those, of course, to the same selection process as it has to our other courts. Both of those courts are statewide courts – full courts of record. They're not limited non-record courts like magistrate systems or things like that. My personal experience is that it

was a wise decision for the legislature to treat those statutory courts and constitutional courts by the same selection process - apart from the fact that it would create practical difficulties to come up with and implement and maintain a separate selection process for the statutory court as opposed to the constitutional court. I think it invites creating two different kinds of courts in a unified court system.

Historically, our district courts and our superior courts as trial courts have worked very well together as a unified court system. If we have a superior court judge who is absent in a small location, we can appoint a district court judge pro tem to fill that judge's shoes. It's tremendously useful to have that. We have cases that can move very smoothly from district court to superior court.

On the appellate level – we have a court of appeals...that handles virtually all of our criminal cases and...ends up being the court of final jurisdiction because the supreme court takes very few of those cases, because it views them as being correctly decided. If you create different selection methods with different selection criteria for the two courts, you invite attorneys to try to get their cases in superior court instead of in district court if they don't like the district court, if they think the district court is doing a different job because it's got people of different qualifications. You invite more challenges of court of appeal decisions because litigants aren't satisfied with the treatment they got from a different kind of judge. So, you kind of invite the perception that we have two different kinds of courts – a statutory court and a constitutional court – and jockeying and a tactical strategic maneuvering by litigants to try and get to the court that they want to get into. One of the strengths of the Alaska justice system is that it isn't parsed out and divided into municipal courts and county courts and state courts. Our government statewide is a state unified government and it is a tremendous strength – I think in both organization and efficiency and...frankly...I always assume that's the reason the legislature created district courts and the court of appeals and gave the council the authority to treat those courts as regular courts.

REPRESENTATIVE GRUENBERG asked if the governor's final appointment process should be public and have standards like the application process.

CHIEF JUSTICE BRYNER replied no. A governor appoints like a jury deliberates - it reaches a consensus and then delivers the result.

REPRESENTATIVE SAMUELS asked if the council had ever overruled the bar poll in the time he had been there.

CHIEF JUSTICE BRYNER answered that the council has numerical rankings to the decimal point and had probably taken people out of order, but he wasn't aware of anyone who was taken from the bottom of the list and moved to the top. A fair number of races have had tight groups of ratings.

REPRESENTATIVE SAMUELS asked if only the lawyer members of the council are picking lawyers or is the whole council picking them.

CHIEF JUSTICE BRYNER replied that the law states that all judges must be attorneys, but the real question is if the council is doing its job of getting the good attorneys and then deciding which ones will make the best judges.

CO-CHAIR SEEKINS asked if he had ever seen the person highest ranked by the bar poll not be selected by the Judicial Council in its final process.

CHIEF JUSTICE BRYNER replied yes, that happens fairly regularly at both the gubernatorial and the council levels. The very highest people are often passed up if there are good reasons, which there often are.

REPRESENTATIVE DAN OGG said he is a lawyer and many times he doesn't know the people on the bar polls because they're not from his area. He asked what percentage of surveyed people respond to the bar polls.

CHIEF JUSTICE BRYNER replied that different polls for different judgeships create lesser or greater amounts of interest and he couldn't give him a general answer.

CO-CHAIR SEEKINS asked Mr. Cohn to provide the committee with that information at some time after the meeting. He replied that he'd be happy to.

REPRESENTATIVE OGG asked if there are instances when all of the candidates are most qualified and what the highest number of candidates that had been forwarded to the governor was.

CHIEF JUSTICE BRYNER replied yes to the first question and he knew of as many as five applicants who were all most qualified and were all submitted to the governor at the same time.

REPRESENTATIVE GARA asked if the bar poll numbers come from people who have sufficient experience with a person in the last five years. The polling numbers from anybody else who doesn't have the experience with the applicant are put off to the side.

CHIEF JUSTICE BRYNER replied yes. Questions are asked about the basis of the vote. People can indicate whether it's based on personal contact, reputation or direct professional experience. The information is charted on who votes in which category, but only the ratings that are submitted by people rating on direct professional experience are used.

REPRESENTATIVE GARA asked if someone is sent up once, why aren't they sent up all the time. He also asked him if he thought he was treated fairly by the Judicial Council all the times his name was before them.

CHIEF JUSTICE BRYNER replied:

> I've had a couple of other times I applied and was appointed to the Anchorage District Court and served for nearly three years in 1975 and while I was in the district court, I applied twice for superior court judges and was not selected. One of those applications was I applied for a superior court judgeship in Sitka and my name was sent to the governor. I wasn't selected; the applicant selected was a long-time Sitka attorney and I certainly didn't feel slighted by that poll. I applied for the superior court in Anchorage; my name was sent; and I wasn't selected. It's always hard. My name wasn't even sent to the governor in 1983 or 1984 when I applied for the supreme court. I've been on the court of appeals for three or four years and it always hurts personally if you're not chosen; that rejection is a painful thing. But I sure didn't

feel slighted or didn’t feel that I had been mistreated. I thought it would have been reasonable to send my name to the governor, but I also personally thought that reasonable people can disagree on that. And I understand what they did. So, my own experience is that it wasn’t a problem.

TAPE 04-74, SIDE A

SENATOR FRENCH said the bar poll questionnaire has boxes to check regarding how knowledge was acquired of the applicant. One of the boxes is direct professional experience; others ask if its substantial and recent, moderate or limited. “I guess I just need a clarification on how you weigh substantial nd recent versus moderate and versus limited.”

CHIEF JUSTICE BRYNER replied that he preferred to have Mr. Cohn answer that.

REPRESENTATIVE GRUENBERG said:

My recollection is that there was a superior court position in the late 1970s around '79 where there was a single vacancy - 13 applicants and about six or seven were sent up for that. I actually applied for that. My name was not sent up and I thought it was a fair process. That's the only time I've ever applied, but on the form itself there is direct professional experience, professional reputation, social contacts and then insufficient. There are various types of criteria - legal ability, impartiality, integrity, judicial temperament, diligence, special skill etc. Chief Justice Bryner, isn't it possible that somebody could have social contacts with somebody and know whether they have a lot of integrity - so that somebody might personally know an applicant and have a lot of experience with them though they may never have appeared before them. And I'm wondering whether the Judicial Council if, lets say, the person who's marking the form only fills out those boxes of which they have personal knowledge - although they may not have been professional knowledge - whether you consider that sort of thing, because that person may actually know the candidate far better than a person who has just appeared in front of them representing somebody in a DWI or something like that.

CHIEF JUSTICE BRYNER answered:

> Sure it's possible that there could be, but then again the focus of this poll is to get - to identify quality attorneys not to identify generally honest people. And the real difficulty here is getting something that places an act or focus on attorney qualifications in a way that really encourages the most qualified kinds of comments. It would be difficult to separate out if we started loosening various categories.
>
> Nobody looks at the bar poll as perfection. It's a tool that helps give us information and each council member decides how much weight to give that information. I think everybody recognizes that there are some people that we miss and some people that we don't. But we try and make up for that by having a tremendous number of other things that we look for and cross checks and by looking over what we do have. And if there are ways to improve it, we do improve it and sometimes if we don't think of ways to improve it and we get suggestions - well, we welcome suggestions. But I don't think there is ever a way to design a perfect poll or a perfect system. I think that trick is in recognizing shortcomings and covering your bases by other information and just doing the best you can that way. But we're always open to suggestions for changing and improving that kind of process.

CO-CHAIR SEEKINS asked what kinds of questions are asked of the applicants during their personal interviews.

CHIEF JUSTICE BRYNER answered that Larry Cohn, AJC executive director, drafts a whole series of potential questions that center around the council's criteria and circulates it among the members. Members have no limitation on asking questions that are relevant to the applicants' experience. Further he said:

> If the applicant gets into issues that call for some follow up questions, there are frequently follow up questions that lead in the direction that the applicant wants to take. It's that kind of process. My experience is that, generally, it's pretty business like and pretty perceptive and sometimes we do get into very personal issues that are troubling the applicant. Sometimes we get into areas that are very

case specific; sometimes we get into general approaches.

CO-CHAIR SEEKINS asked if questions are asked about philosophical or political affiliation.

CHIEF JUSTICE BRYNER said that political affiliation questions aren't asked, but questions are asked about religious ideas when called for by the direction the discussion is taking. A strong criminal defense lawyer could be asked whether he thought he could judge fairly in criminal cases, for instance. Party affiliation has not been asked.

CO-CHAIR SEEKINS asked:

> You wouldn't get into things that would tend to indicate someone had a liberal or conservative particular viewpoint in their personal lifestyle or how they carry out their viewpoint on the law?

CHIEF JUSTICE BRYNER replied:

> I don't think we would get into that. We would definitely, if we had an attorney who, for example had a strong and consistent background in criminal defense work and was known as a zealous advocate. I think my experience is the council members would feel free to ask, 'Well is it going to be hard for you to judge fairly in criminal cases and to find people you defended guilty?' Those kinds of questions are fair and good, but in terms of 'Are you Republican? Are you Democrat?' I've never been - but then my personal experience of questioning goes back about a year and four months. I've been through the process. I've never been asked those kinds of questions and I've really never heard them asked.

CO-CHAIR SEEKINS said:

> You said that in some of the comments that are made, some of these comments sometimes come in anonymously. In my own personal experience, it's very difficult for me to put much weight in an anonymous comment. When I look to see what King Solomon did, he said you get a chance to look your accuser in the eye. Is the opportunity there for applicants to do that if there

is an anonymous comment that could possibly throw someone out of contention?

CHIEF JUSTICE BRYNER replied:

> There isn't that opportunity there because that would - we give applicants now sort of a summary of the kinds of comments they've gotten. We don't give applicants, now, the actual comments. That practice, in my recollection, has changed from time to time. I've been an applicant at times when we did get all of the comments and we had them there and had them available. Right now the practice, and I'm not personally aware of it, but I assume it's because some of the comments are sensitive and that if they're revealed they're revealed (indisc.) disclosure and there's a desire to avoid setting up a situation of retribution or something like that. But we try, I think consistently, to give at least enough an indication of the nature of the comments that might be of concern to give the applicant a fair opportunity to address that in the course of discussion. That may very well be - I personally never minded getting comments and that's certainly an area that we can look at.

SENATOR SEEKINS thanked Chief Justice Bryner for testifying and asked him if he had any closing comments.

CHIEF JUSTICE BRYNER responded:

> I don't really think I have any more to say. I very much appreciate the attention and effort that you've put into this and I'll certainly be available if you want to hear from me again.

SENATOR SEEKINS: We appreciate your help.

CHIEF JUSTICE BRYNER had one more comment:

> One thing I do want to say is I do want to take this opportunity to give credit to the regular members of the council. They serve as volunteers. It's a tremendously difficult job and at times like this it calls for a great deal of courage on their part - especially the citizen members who, I think, to some extent, I really don't think may not have signed on

> for this kind of duty. It's a hard thing for a lot of people to go through and I think that they deserve a lot of recognition in their willingness and their ability to do it. To me that's just another measure or the strength of the process.

CO-CHAIR SEEKINS thanked him again and invited Judge Stewart to address the committee.

JUDGE TOM STEWART said he was born in 1918 and has been close to the decisions that were made on how the selection of judges should take place around 1954 when he was the Assistant State Attorney General. At that time, he was appointed chairman of the Committee on Statehood and Federal Relations, which had the function of calling a constitutional convention. He resigned his job as assistant attorney general and began looking for ways to conduct a constitutional convention. Federal requirements in SB 50 were insufficient. He traveled across the country visiting political science departments of the best universities and set up draft legislation to carry out the mandates of the constitution in setting up the state government.

The history of the merit system for the selection of judges tremendously influenced what the convention did in adopting what was called the Missouri Plan. He recounted to the committee:

> It was first called the Missouri Plan, but before that, the first proposal of this type of approach to selecting judges was by a Professor Albert Kales of Northwestern University Law School in 1913. There was already a tremendous dissatisfaction in many of the states with the selection of judges - which is primarily by popular election.
>
> It was fostered in Missouri by Lawrence Hyde who was the Chief Justice of the Missouri Supreme Court. He and others were very upset about the inconsistency of the system of electing judges in popular elections. Basically, judges came from the ward office. When the Republicans were elected, you got a Republican judge. When the Democrats were elected, the Republican judge was thrown out and you got a Democratic judge. They reflected the politics with which they were associated.
>
> Another serious concern was the cost of elections. In New York City, for example, today where they still

elect judges, it costs from $100,000 to $200,000 for an individual general jurisdiction judge to be elected and he has to get that money from contributors. The contributors' ideas about what he should do in the job are affected by from where he got the money.

These were only some of the kinds of problems that confronted the Missouri people. They had a constitutional convention in 1944. At that time, they adopted this plan called the Missouri Plan – for the selection of judges. Following its being adopted in their constitution in 1944, there were at least three attempts to repeal the language and the voters liked it. The votes were roughly two to one to keep the plan in force. It did not stretch across the whole state of Missouri; it affected really only St. Louis and its surrounding areas and Kansas City, their two largest cities. It wasn't used in the smaller places where people were more likely to know the individuals who were running and to know them as judges.

One of the critical elements in Judge Hyde's view was the existence of an integrated bar.... We have an integrated bar in Alaska. The creation of it was enacted in 1955 when I was in the legislature on the Judiciary Committee. I participated extensively in the adopting of the law creating the integrated bar. The integrated bar means that there is a statewide association to which any person who aspires to be a lawyer must belong and must participate in its business. Before 1955, there were bar associations, but they were strictly local. They were strictly voluntary organizations. They had no authority of any kind. But, Alaska had the integrated bar, which Justice Hyde considered to be significant.

I never knew Justice Hyde, but I knew his son, Lawrence Hyde, Jr., who was also a Missouri Judge. He was the second dean of what's now called the National College of State Judges. I attended that in 1967 and was able to talk with him about the operation of the system in Missouri.

In Alaska, the Statehood movement came about because of many concerns, but one of the most serious concerns that precipitated statehood was with the judiciary. We had only four general jurisdiction judges in Alaska;

one in Juneau, one in Nome, one in Anchorage and one in Fairbanks. They were appointed by the president; they were not necessarily Alaskans. The last territorial federal district judge was a man named Raymond Kelly and Kelly had never been in Alaska. He had been the president of the American Legion; he had been very active in Republican politics and when Eisenhower was elected, Kelly ran for governor of Michigan and was defeated by Menon Williams and he needed a job. So they made him a judge in Alaska. That's the way we got judges in the territorial days.

As it turns out, Raymond Kelly was a pretty good judge. I practiced in front of him and we became good personal friends, but this was happen stance. It wasn't the way to select judges, for sure.

After WWII when Anchorage burgeoned and got up to 150,000 people with one judge there, it was impossible for that judge to handle the criminal defense calendar, much less a civil calendar. I was a law clerk to Judge Folta in Juneau and we spent most of the year in Anchorage helping out Judge Dimond, because his calendar was so overloaded, he couldn't possibly attend to the business that was before the court. The problems of the judiciary were paramount in the whole statehood movement.

In the course of my job as being chairman of the joint house and senate committee that drafted the legislation to call the convention, the chairman of the senate committee was Bill Egan, but since I had done this research, he agreed that I should be the chairman of the joint house and senate committee that determined what the convention structure should be – how many people, where it should be held, the length of time of the session, the availability of consultants to assist the delegates, the preparatory work – all of that was detailed in the bill that we passed in 1955.

In the course of doing this research, I met two people who were significant and became consultants to the Alaska convention. One of them was a man named Sheldon Elliot. He was a close associate of Chief Justice Arthur T. Vanderbuilt of the New Jersey Supreme Court. When the New Jersey courts were reorganized by their

1946 convention, Vanderbuilt became the head of it. He and Sheldon Elliot wrote a book called Modern Judicial Administration and it set out the principles for how courts ought to be organized. Before that time, the courts in New Jersey were county courts. There was no central direction of the courts. The county courts had varied bases of being financed. Poor counties got poor courts; wealthy counties got better courts. But he organized the idea of a statewide court system overseen by the Supreme Court in which all courts got the same treatment in terms of financing facilities, personnel and that sort of thing.

Sheldon Elliot, after he cooperated with Vanderbuilt in writing that book, became the executive director of the Institute for Judicial Administration in New York City. I had met him and talked with him about our venture into writing a constitution on that trip I made across the country. So, I had Elliot's name as a possible consultant for our convention on the subject of judicial administration.

The other person who was significant was a man named Glenn Winters. Glenn Winters was the executive director of the American Judicatory Society, which then had its offices in Chicago and they were engaged in extensive studies about court systems. He came to Alaska and we met and I got to be a close personal friend of his and did a lot of work with him partly on the creation of the integrated bar, because of the Judicatory Society, which is still a very prominent research and study group in the whole world of judicial administration. His leadership in the Judicatory Society reflected his background in this work.

The legislature of '55 structured the convention and I became the executive director of the Alaska Statehood Committee in April of 1955. Bob Atwood was the chairman of the [Alaska Statehood] committee. The chairman of the finance committee of the legislature was a man named Ken Johnson of the Johnson Insurance Agency. In preparing the bill for the convention, I drafted a budget for the convention proposing how much of a cost and where we would get the funds and worked closely with Ken Johnson on that. After that association, he went to Atwood and said we'll give you

this money for the convention, but I want you to appoint Stewart to be the executive director of the Statehood Committee and carry out the functions that appeared in the statute passed in 1949 creating the committee that directed them to prepare for the holding of a constitutional convention. Up to that point, they had done almost nothing to carry out that mandate. So, in April, I became executive director of the Statehood Committee and had many functions.... SB 50, which would have created Alaska as a state, had language in it creating a convention and specified that the convention should be in Juneau, the capital.

On my trip I met a woman in New Jersey who was the vice president of the New Jersey convention and she said you should hold your convention at the state university. I said we don't have a state university; we have the Alaska Agricultural College and School of Mines. Hold your convention there. Her justification for that recommendation was they had held the New Jersey convention of 1946 at Rutgers, which is their state university. It avoided entrenched lobbying interests; it avoided the diversions that the legislative members found in Juneau. After a plenary session of the early legislatures, in the early afternoon you could find the legislators in the pool hall in the Elks Club playing cards and otherwise not being at work. She said at the university setting in an academic atmosphere, the availability of the libraries, the availability of professorial assistance was very important.

So, when I came back to Juneau, although I was a denizen, you might say, of Juneau, I was convinced that we should have our convention in Fairbanks and I persuaded the joint committee that that's where the convention should be - at the site of the university....

They chose Sheldon Elliot to be the principal advisor to the committee on the judiciary. Another man there named John Bebout, who had been to numerous conventions.... who was very helpful also as to how should the judicial branch be organized. They are focused on what has become known as the merit system for the selection of judges. So, the delegates have the advantage of hearing from true national leaders in

> this field of judicial administration – what is the best mechanism for selecting judges....

JUDGE STEWART read Judge Hyde's response to the question of why the Missouri Plan was adopted – a lack of good judges, fear of a link between judges and politicians and a general desire to elevate the tone of the bench. "You need the kind of examination of qualifications that this council does in order for the voters to have some recommendation of somebody who is knowledgeable about it."

JUDGE STEWART also said:

> I would make a comment about the determination to set up the court system. In that first state legislature in 1959... we anticipated it would take three years to set up the court system. There was a case pending in the Ninth Circuit Court of Appeals - it was Territory of Alaska versus Parker. I don't remember the crime which had been committed, but he had a very fine lawyer by the name of Wendell Kay here in Anchorage. After the conviction in the federal territorial court, he appealed the conviction to the Ninth Circuit Court of Appeals. Now, the Congress when it passed the Statehood Act in July 1955 explicitly gave jurisdiction to the territorial court to continue to hear cases in Alaska until Alaska was able to organize its court system. And the original bill, Chapter 50 of the session laws of 1959, specified that the court system would be in effect by January 1, 1962, three years after we were working on the subject.
>
> One of the points Wendell Kay urged to the Ninth Circuit was you don't have jurisdiction to hear this appeal for my client, Mr. Parker. That's the decision that the Ninth Circuit made in the middle of May 1959. The Congress had given jurisdiction to the trial courts, but they failed to give jurisdiction to the court of appeals to hear appeals from the interim trial court until Alaska should have its court system. So, that first legislature lasted from January until well into May and we amended that bill to have the Judicial Council immediately – forthwith was the language that was used – structured and appointed - immediately proceed to nomination of judges and go as quickly as possible to the formation of the court system. They did that and the council was created in

early June of 1959; they nominated the supreme court justices; the governor appointed Newell Nesbit, and Bill Egan who was the governor said, 'I appoint you to be chief justice.' There was nothing in the statutes that specified how the chief should be chosen. And he appointed John Dimond, who was a fellow Valdez resident of Bill Egan's, and he appointed Walter Hodge, who had been a territorial judge in Nome.

The Supreme Court met and the Judicial Council also named judges. They named nine judges of the Superior Court compared to the four that had been operating in Alaska before that time. Those judges were appointed in August and September of 1959.... Those judges went to New Jersey for two weeks meeting with the judges of the courts in New Jersey in order to get some personal experience about how a court system structured this way was going to function. There were huge questions about space, where they could meet, supplies and personnel. There had been four experienced court reporters with the territorial federal courts – all of them were ready for retirement and Chief Justice Nesbit made the decision before the courts even began to not use court reporters to report the case record – instead to do it electronically with a company called Sound Scriber – that he was familiar with – that provided tape machines on Navy vessels. He was the captain of a Navy destroyer. These tape machines went very slowly and the recording head went back and forth across the tape like this so as the tape moved the recording was in a triangular formation.... There was a lot of opposition from the court reporters across the nation to adopt this electronic system and Alaska was the first one to do it. I was the court administrator from '61 to '66 and was much involved over the struggle in getting that system properly functioning and it has worked well to this day. I don't think anybody would want to change it....

In fact, they were in operation on February 20, 1960, barely a year after statehood instead of the three years that we contemplated would be necessary.

JUDGE STEWART said he thought the Judicial Council is working excellently.

TAPE 04-74, SIDE B

CO-CHAIR SEEKINS asked how many attorneys were practicing in Alaska at the time of statehood.

JUDGE STEWART replied probably less than one third of the number that practice now, especially in Anchorage.

CO-CHAIR SEEKINS asked if they were pretty well acquainted with each other and when did the bar poll come into existence and in the early years was a lot of weight put on it for determining most qualified applicants for judgeships.

JUDGE STEWART answered that applicants were pretty well acquainted in their local districts; but some didn't have as much opportunity to travel around the state. In 1955, after the integrated bar was created, there were territory-wide bar conventions that were well attended. The bar poll began early on and he didn't know how much weight the council placed on it then.

SENATOR FRENCH asked:

> It's been 40 years since we adopted the Missouri Plan and made it part of our judicial system. Have other states tinkered with their system since then? Have other states gone back and had to modify it since then?

JUDGE STEWART replied:

> I don't know. I know that other states have adopted the merit system for the selection of judges. I can't tell you how many. I'm sure there are still too many states that have elective systems. I went to the National Judicial College on the campus of the University of Nevada at Reno where the National Judicial College has been functioning since almost the beginning of its existence and I met, - in the years that I went there, which was between '66 and '81 - I met many judges from other jurisdictions and I know that almost universally they were envious of our system.

CO-CHAIR MCGUIRE asked:

> In Article 4 of the judiciary of the constitution for nomination and appointment - obviously it sets out the fact that the governor shall fill any vacancy in the office of the supreme court justice or of a superior court judge by appointing one of two or more persons and it sets out the judicial council model - the Missouri Plan. What, if any, discussion was had about the notion of including future state created courts and why or why not - I mean why would they not include it? Or did the discussion not even occur?"

JUDGE STEWART replied:

> I'm not a good person to answer that question because as I said to Representative Gruenberg, I was not a delegate. I was upstairs in an administrative office. I did not hear the discussions. On the other hand, I was close to many of the delegates. My father was one of the delegates and in the evenings I would often meet with the delegates in hotel rooms and talk about what they were doing. But I can't directly answer your question - what was in their mind.

REPRESENTATIVE GARA asked if he thought the governor should be able to pick from all candidates or just selected ones.

JUDGE STEWART replied that he should pick only from the most qualified candidates based on the work of the Judicial Council. He elaborated that it would be very easy for any governor who had a favored candidate for judge to get the word to him to apply and if he met the technical qualifications he could be one of the applicants. The governor could then pick the man he selected in advance.

> The system could be corrupted if you try to send him all the names.... But, directly, to answer your question, I am in favor of what they are doing – deciding themselves how many names ought to go up.

CO-CHAIR SEEKINS queried:

> In that regard, when you look at the merit selection process that is part of the Judicial Council's - taken from their web site that says that the Judicial Council is required to screen judicial applicants based on their ability to be fair and competent judges rather than their political contributions, party

connections, or how well they look on TV. With that in mind, do you believe that the criteria that the Judicial Council uses, at this point in time, adequately fulfills that charge?

JUDGE STEWART replied:

I think it does a good job of that, but we're all humans, we're all capable of error. Maybe the process can be improved some way. I'm not that close to what they do, but I think that in answer to your question, yes, they do apply the criteria properly.

CO-CHAIR SEEKIN said he still didn't totally understand what the criteria are.

JUDGE STEWART replied:

Mr. Chairman, it has to be subjective. How do you determine judicial temperament? You really find out only after a person has been a judge - what he's done on the bench. They are very subjective questions and the people on the council have to apply their subjective backgrounds in determining how they see the criteria fit a given applicant and I'm willing to put my trust in the judgment of that seven-member group.

CO-CHAIR SEEKINS said:

I think that's what I'm looking to try to find out. Is the process fair? Is it consistent? Is it reasonably transparent? Is it producing for us the very best possible candidates for selection? That question has been raised numerous times in my short time in the Senate as chair of the Senate Judiciary Committee and so I think it bears looking into to find out if this system that we do have is the right one and not trying to tell the judicial council how to make their rules. But is it the one that does produce for us the very best judiciary? If not, are there suggestions we could make?

I appreciate the fact that I have received a copy of a letter from the chairman of the Judicial Council to the members saying, 'Lets take a close look to see if what we're doing is the right thing and see if there are changes that are necessary.' Because I think a lot

has changed since the days when we first - I was 10 years old in 1955 so I don't have a lot of history on how it came together, but I do know that a lot of things have changed a lot since then and I appreciate the fact that the council is willing to take a look to see if there's ways they can fulfill their mission better. And I guess that's what I'm kind of looking at with you as well and other people who have had that history - to give us suggestions that we can pass on or how do we or should we, as a legislature, propose a change to the people in the state of Alaska in terms of a constitutional amendment or whatever. In the end, we hope to have said we've turned on the light and we either have the best system in the world or we need to have the folks take a look at the system to see if it can be improved - or we absolutely think it's necessary that some things be changed and here are our suggestions. I appreciate the fact that you have that history because I don't. Hopefully we can come out in the end so that the people of the state of Alaska feel confident in the process that they're getting the very best judiciary they possibly could. So, I guess that's my question. It's very hard for me to say that there's any truly objective system in the whole world. Everything is somewhat subjective.

JUDGE STEWART: That's right.

CHAIR SEEKINS: So thank you today - Other questions from members? We have questions from members online by the way.

JUDGE STEWART asked to respond briefly:

I agree wholeheartedly that it's good for you to take a look at the system, but I'm confident in my own mind that you won't find anything better. The appointive system is political, the elective system doesn't work - I don't know of any system out there that any state uses that's any better than what we do. That isn't to say that it can't be improved upon.

CHAIR SEEKINS responded, “I won't keep us from looking.”

JUDGE STEWART said, “That's right and I applaud your effort to look into it.”

REPRESENTATIVE GRUENBERG asked if they had contemplated that the legislature might create additional courts in the future.

JUDGE STEWART answered that he thought they contemplated district courts and this decision was initially left to the presiding judge of the district. He agreed that the judiciary branch, led by District Court Judge Bruce Monroe, recommended to the legislature that the Judicial Council be used in the selection process.

REPRESENTATIVE GARA asked if it was possible for the council to favor a special candidate.

JUDGE STEWART replied:

> I am confident that when you look at it, the Judicial Council has not played a political game. The judges are about equally with Republican and Democrat backgrounds.... It could happen, but it's more likely to happen under one of the other systems than it is under this one.

SENATOR THERRIAULT commented:

> One of the allegations that I had heard was that of the three names that were put forward, two of them had problems that would surely take them out of the running and therefore there would only be one left. Now I have spoken to somebody on the council whose word I value highly and he assured me that didn't happen. But without having a better understanding of what the process is that allowed the three names to rise above the others, I didn't have much of an ability to assure the constituents that came to me that the process had not been gamed someway. So I think that the discussion is going to be useful if for no other reason....

JUDGE STEWART heartily endorsed them taking a look to see if things could be done better. "But that doesn't stop me from saying I think it's the best system in America today."

12:09 – 1:40 – Recess

MR. LARRY COHN, Executive Director, Alaska Judicial Council, introduced members of the council in attendance.

REPRESENTATIVE GRUENBERG asked:

> Something that Judge Stewart said this morning - a lot of things he said were a lot of interest to me - but one thing in particular. He talked about the history of how the then superior court judges suggested that the law be amended so that district court judges would become subject to nomination through the Judicial Council. As I understand, that must have been done statutorily. Do you know anything about the history of that statutory amendment?

MR. COHN replied that the constitutional convention minutes discusses judges in general and says the legislature should have the power to create other judgeships.

REPRESENTATIVE GRUENBERG asked him to research Judicial Council files for any documentation on what the policy was behind the request to amend Alaska law.

CO-CHAIR SEEKINS responded by asking Legislative Legal for an opinion on that issue.

REPRESENTATIVE OGG asked how many lawyers respond to the bar polls.

MR. COHN replied:

> The response rate on our selection surveys varies from about 25 to about 40 percent of the attorneys that we survey. And of course, not all attorneys respond about each applicant. Some attorneys may have sufficient information to respond to some applicants and not others. If you look at any particular survey, for example the page that we gave you out of a recent survey, it will show you how many attorneys actually rated that person based on direct professional experience. It really varies depending on the location of the judgeship. Attorneys that practice in a larger urban area obviously are known by many other attorneys than attorneys that practice in a rural location and it varies on the type of practice that the attorney has as the chief justice mentioned. If a judge is applying for say a higher judicial position we commonly get hundreds of people that respond based on direct professional experience. Whereas if you have someone who has a fairly insular or parochial

practice, then we may get 60-70 people that respond based on direct professional experience.

Our professional surveys - we do ask as was discussed this morning - I think Representative Gruenberg asked - wouldn't it be valuable to know even if somebody knew somebody based on reputation - wouldn't it be valuable to know whether that person had a good reputation for integrity or other criteria. And it is good to know and we do ask that. That is, we ask people if they only know the applicant by reputation or by social contact not to fill out the survey and they do that - and although we don't calculate those numbers in the numbers we release in press releases based on direct professional experience - as you can see from the sheet that we passed out, we are able to see how those people fare in those various criteria, based simply on social contacts and reputation. So I think in this last selection survey, the number of people that rated any particular applicant, based on direct professional experience, ranged from something like 75 to 300 and something, I would say. But generally between 25 and 40 percent return rate.

SENATOR HOLLIS FRENCH asked:

Mr. Cohen, your last answer answered most of my question, but I guess I'm still curious about how, if you're strictly presenting the bar poll as being those folks who have direct professional experience with the applicant, how do you weight for whether the experience is substantial and recent, moderate, or limited. And maybe you could explain how that works.

MR. COHN replied that demographic questions are on the survey and that information is available for the interviewers to use if they want.

SENATOR FRENCH clarified:

So if I understand you right, it doesn't really matter what level of experience they have in producing the figure - the bar poll result - but it's something you explore in the interview process.

MR. COHEN replied:

> Yes, sometimes the scores are consistent so there is really nothing to ask about on that particular issue, but if there was some discrepancy or inconsistency based on the amount of experience that the respondents had with an applicant, that's something that an applicant might be likely to be asked about.

REPRESENTATIVE GRUENBERG asked how the council can tell what kind of experience a lawyer has had with an applicant from information on the survey.

MR. COHN answered:

> We ask demographic information about the type of practice that you have so that we can identify you as an attorney who practices either civil law or criminal law or a mixture and the size of your firm. We don't know from the bar poll unless you submit a comment to us identifying the nature of your practice, we don't know that you practice family law. It's been suggested, from time to time, by attorneys who say, 'We don't know much about these applicants and we'd like to fill out more surveys if we only know more about them. Why don't you circulate resumes of these people and we'll weigh in on their experience.' The reason that we don't do that is that the criteria that council members maybe rely on or that is less useful to them than other criteria, might be the suitability of experience criteria on the bar poll because council members have abundant information to assess the suitability of applicants of experience - absent the bar poll. And so it would just be soliciting opinions of attorneys who are less familiar with the applicant than the council members themselves were we to do that.

REPRESENTATIVE GRUENBERG suggested having a section in the poll booklet that would allow a respondent to explain, if he wants to, how he knows the applicant.

MR. COHN responded that the council would be willing to consider language that would invite comments.

REPRESENTATIVE GARA asked if the council would be willing to consider adopting specific written criteria and if it would be willing to suggest a budget that would provide more effective public notice in the public comment portion of the process. He

also asked how the council could gather information on hiring executive level people.

> The second question - it seems clear that in the smaller communities where people know that somebody is applying for a judgeship - the public might be more apt to show up to speak out. We heard about the Kodiak case earlier today. The Kodiak opening and the Kodiak people showed up to give their comments - general members of the public. It seems that that doesn't happen that much in a larger city like Anchorage. If this group of legislators wanted to expand the amount of public notice, could you give to us, maybe, a budget request of what it would take to provide more effective public notice - when you're taking in public comment on a judicial opening. Would you be able to give us some sort of figure on a budget proposal for what it costs and how you would do it if that's the direction we decided to go?
>
> Those are the two questions. Would you be able to provide us with some sort of budget request and craft some sort of budget proposal if the others in this committee think that would be a reasonable thing to do for more public notice? The other is, what are your thoughts on how you might gather the criteria that other people use to hire executive level people?

MR. COHN replied:

> Yes, I'm quite certain the council members would be willing to consider how they might broaden their criteria if there are more important criteria - things that they're not looking at now. I think the council members would - I don't want to speak for them because they're here but I'm confident that they would welcome specific suggestions and would be willing to consider other criteria they might employ. And with respect to advertising our public hearings more frequently or in some other fashion, it would be very easy for us to work up a budget request. It is expensive, but it is well worth the cost if the result is a higher attendance and more public input -so, yes to both.
>
> Since you asked about public input, I know that Representative McGuire asked this morning about why we don't do surveys of peace and probation officers,

social workers, guardians ad lidem, jurors, court employees such as we do for retention and get a broader perspective. There are a couple of reasons. One is that a very low percentage of those people would likely have experience with applicants where a good percentage of those groups have experience with judges, which is why we survey them.

And the second and most compelling reason maybe is just the cost - the cost of doing the surveys. They're expensive and if we were to weigh how much it would cost to survey the thousands of people that we survey for retention - and we probably get more input from the public than maybe anywhere in the world for retention. If we were to do something similar for every selection process, weighing that against the beneficial information we might gain doing that, I think it wouldn't be a good use of our resources.

CO-CHAIR SEEKINS asked if he had data on what percentage of the applicants come from the public sector versus the private sector.

MR. COHN replied yes.

MS. TERRY CARNES, Senior Staff Associate, AJC, offered that the council has a sizeable database on applicants that goes back many years. She recollected that the ratio between public and private is about even. What kind of people apply for a vacancy depends on its location.

MR. COHN added that 50 percent of nominees are prosecuting attorneys and 50 percent are defense attorneys.

CO-CHAIR SEEKINS asked if any weight is given to the years attorney applicants spend in private practice.

TAPE 04-75, SIDE A

MR. COHN replied yes, many members consider that. They are also interested in the administrative aspects of running a business and time management skills that some people might argue public sector attorneys are less cognizant about.

CO-CHAIR SEEKINS asked if he is present during the interview process.

MR. COHN replied that he is.

CO-CHAIR SEEKINS asked if people are questioned about their political affiliation, their political activities or their political philosophy.

MR. COHN replied that people are absolutely not asked about their political affiliations. In three years of interviews, there have been 21 judicial vacancies – more than in the previous 10 years - he has never heard a political question asked in an interview. However, applicants have to list all their outside activities on a lengthy questionnaire – mostly for conflict of interest issues. Some applicants have been active in politics. If that's the case, they might get a question like – "You've been active in politics. If you're appointed to the bench, would you do anything differently about your political activity?" - because obviously, there are judicial cannons that preclude judges from being involved in political activity, but in terms of asking what someone's politics are – nothing like that.

In the last month or so he had read in the newspaper about council members political affiliations and remarked, "I think it's a testament to the process that I was unaware of what that was until I read it in the newspaper."

CO-CHAIR SEEKINS asked if he prepares many of the questions for the council members to ask in the interview process.

MR. COHN replied yes. He prepares a couple of different lists of general interview questions that apply for the superior court vacancies, one for the district court vacancies, etc. The council members may choose to ask any of the applicants these questions, but scripted questions would invite scripted answers, which would be less meaningful. He does not ask any questions in the interview process, itself.

CO-CHAIR MCGUIRE asked what his personal reaction was to Chief Justice Bryner's letter and the suggestions he made regarding an evaluation of the bylaws and the fact that they hadn't been reviewed for 20 years and the potential to insert a provision for regular review.

MR. COHN replied that he welcomed the suggestion; he hoped the council members followed through on that recommendation.

SENATOR FRENCH asked what the process would be for reviewing and changing the bylaws.

MR. COHN replied since the bylaws had not been reviewed, there wasn't a process, but Chief Justice Bryner's letter recommended including input from various branches of government, the public at large, applicants and judges.

SENATOR FRENCH asked if the members of the AJC are responsible for promulgating their own bylaws.

MR. COHN replied yes; the constitution says that the council will operate under rules that it enacts.

REPRESENTATIVE GRUENBERG noted that the AJC has independent counsel.

MR. COHN replied that the AJC has a full-time staff attorney, Suzy Dosik, who is not associated with the Department of Law.

CO-CHAIR SEEKINS referenced a letter the administration recently sent to the council asking about information it had picked up regarding two candidates in the recent selection process.

> The response was that this was information that had already been considered by the council – that the council didn't want to review that information any farther. Is that a relatively accurate paraphrasing of what went on?

MR. COHN replied yes.

> Mr. Clark summoned me to his office about a week ago or whenever it was and asked me if the council had known information about two applicants. The council was aware of that information – both recently when these applicants applied and in their prior application, which was about a year and a half to two years ago. In both cases, the matters were investigated by staff. Council members were advised of the results of the investigation of those matters. The applicants were asked about those matters in their interviews. One applicant was asked about the matter both in the interview this time and two years ago and the other applicant was asked about the matter Mr. Clark raised to me in the previous interview and less directly this time around.

> I'm sort of anxious to mention that when I talked to Mr. Clark, I asked him whether the governor was aware of that information at the time he sent the council a letter rejecting all of the council's nominees and Mr. Clark told me that they were not aware of that information. So, that was not the reason that they had for rejecting the nominees that were forwarded to the governor by the council.

CO-CHAIR SEEKINS said he was concerned about the procedure in dealing with that kind of information. He asked how exhaustively the past history of an applicant is researched.

MR. COHN explained that case files and court tapes are pulled and, if appropriate, people are contacted. If needed, legal research is done. This has raised the issue of what the council should do if it became aware of new information after it submitted its nominations to the governor. Right now there is no set procedure.

> It has almost never happened.... In Kenai last year it did happen sort of. The council nominated an applicant and after the applicant was nominated, we heard from the governor's office that there had been a petition from people in that community who were opposed to this particular applicant. Well, we heard nothing of that sort in advance of the nomination. We had a public hearing, but not one person came forward to denounce that particular applicant or raise any of the issues that they raised. I don't even to this day know what they were in that petition. That's the only instance I can think of that something came up after an applicant had been nominated.

CO-CHAIR SEEKINS asked if he or his staff make any official or unofficial recommendations to the council about applicants.

MR. COHN replied no.

SENATOR THERRIAULT noted that the bylaws currently say that once the selected applicants are submitted to the governor, new information couldn't be considered.

MR. COHN replied yes that's true. That rule is in place in case a governor requested more names. He supported creating a

procedure for the council to reexamine its nominations if new information came to light.

REPRESENTATIVE GARA said he didn't think the council should have to change its rules to deal with post-nomination evidence, but suggested if some bad information comes out about a nominee, the governor should hear it.

CO-CHAIR SEEKINS commented, "Kind of a dangerous rule to protect turf. Isn't it?"

MR. COHN responded that he could see the reason for that rule, because, "Otherwise there would be a constant attempt politically to get the council to change its position and there is a need for finality."

REPRESENTATIVE GARA followed up asking why the Judicial Council should change its rules to deal with the issue of post-nomination evidence when that evidence will go to the governor who is making the selection process anyhow.

CO-CHAIR SEEKINS said that issue would be discussed later.

CO-CHAIR MCGUIRE described the judicial selection system in Russia where sometimes the names are rejected and new ones must be put forward. So, it can be done. She said our system is good, but the one place for improvement is to have more public input.

> The legislative branch is representative of the people; the judicial branch is supposed to be more neutral and it is supposed to be non-political, but the fact remains that we're all human beings; we all read the paper; we all are a product of the families that we grow up in and around the things that we've seen and through that we form opinions about the world. That's okay. But, I think that it's important that folks here in our community have the opportunity to have some input, too. I get very concerned about this small tiny pool of people that come from the same educational background - maybe you could even argue that there are more statistics that come with that – being the people that end up deciding the makeup of this entire branch of government. I want to hear from you whether that's a concern that you share. If it's not, let me know why and how do you think that we can make more members of the public, more average members, citizens of this state a bigger part of the process.

MR. COHN agreed the more public input the better. The council has always solicited more information from the public about judges in the retention elections than anywhere else in the world. The constitution has a good balance in which the public has input in more ways than are completely obvious. First, the legislature, which is elected, establishes minimal criteria for judges – how many and where - and confirms the non-attorney members of the council. The non-attorney members have been a diverse group of people that is fairly representative of the public at large.

> In the selection process itself, we have a public hearing, as you know, and there may be ways to enhance the attendance at that. We also invite public comment through our website and we get public comment and unsolicited feedback from the public including from litigants about applicants. If anyone were to have suggestions on how we can make better use of meaningful public feedback on judicial applicants, I'm sure the council would consider it.

REPRESENTATIVE GARA asked how public hearings and comments are advertised.

MR. COHN said the public hearing is announced in both the legal and ad sections of the local newspaper. It is also listed on its website and on the statewide notice system.

CO-CHAIR SEEKINS announced that members of the council would address the committee now.

MR. BOB GROSECLOSE, testifying via teleconference from Fairbanks, said he has been an attorney member of the council since April 2000. In the 20 years he practiced before being on the council, he heard criticism of the way the council occasionally approached things and why the numbers of names were limited in the way they were. It meant a lot to him, serving as a council member, to be sure he had a good foundation and a good understanding of the legal framework that creates the council and how it goes about its business. He was satisfied that the council selects the best. He used the analogy of a classroom situation when he considers applicants by saying he doesn't look for the pass/no pass students; he looks for "A" students.

> What we want when we're selecting the best in the state requires more care and the rule I use for myself

– my background is in private practice, so I do have a bias - when I look at applicants, I want to know that they have an appreciation for the real world as it impacts litigants in the practice of law. In the private practice of law that means money – the cost of hiring an attorney - the cost of waging litigation. Those are real-world considerations, but there are also the other factors that naturally the bylaws emphasize that you've heard about – integrity, temperament, suitability, past experience. From that approach and as we thoroughly look through...read the comments, read the material – the interview, of course, is a very key part in the way I approach my function, because I want to be able to look the candidate in the eye and ask him questions and sort through any misgivings I have. But, when it's all over and done with, much like the teacher in a classroom assigning As, Bs and Cs, I'm looking for more than a no pass/pass. I'm looking for the A students. Yes, I do grade on a curve, because that can happen based on the panel, based on the location, based on the type of judgeship that we're dealing with – to where someone may end up being getting an A grade so to speak in one setting and not in another. But, if I hold true to what I view as my charge and that is to give the governor the best, to give the state the best, I'm looking for those that make an A grade or make a B+ grade that are up there. I always want and I should say my final test for myself is I don't want to read in the newspaper a week or two later of the governor making an appointment of someone that I have some misgivings on. I don't want to find myself pausing and sighing, 'Oh, gee, I'm sorry he made that choice. I wish he'd picked somebody – one of the other names that I've sent.' I want to feel comfortable in knowing that any of those folks that get passed on to the governor are people that I'm going to be able to stand in front of, proud whether I'm in a legal role as a lawyer or whether I'm there as a litigant myself. I want to know that the judging in this state is going to be as even a playing field as possible and a place of fairness and dignity....

CO-CHAIR SEEKINS asked him how long he had been on the council.

MR. GROSECLOSE answered:

> I've been on for four and a half years. I started April 2000. My term will end February of '06. I might comment, incidentally, because people often wonder, well, can you run for reelection if you aren't a lawyer. I think the answer is technically yes. I don't know many who ever have. I'm a believer in term limits in this capacity, because I think this is a commitment that lawyers need to make to their profession, but it's also a commitment that's best shared by allowing fresh blood and new blood and a new perspective to come about. Six years is a long enough stint by itself, I believe.

CO-CHAIR SEEKINS asked if the qualifications were so stringent they kept qualified people from applying and how he felt about the number of applicants.

MR. GROSECLOSE said the turnout has been healthy as long as he has been on the council. A handout that the committee has provides a short summary of the past three years.

> With a few notable exceptions, and the one that comes to my mind is a Bethel selection process that unfolded a few years back, we have had a good healthy turn out. There is no question that the process as it now exists is ego-bruising. I'd tell anyone who is interested in applying for a judgeship that they do have to go through a number of hoops. It isn't maybe one of their first liking... One question I often ask in the interview session is how has the process treated you and do you have any suggestions.... By and large people are happy with it.... I don't believe that the process as it now exists discourages folks in a way that makes me think there is some way to fix it or make it different.

CO-CHAIR SEEKINS asked if the council received some applications from applicants who should not have applied.

MR. GROSECLOSE answered yes. Fairly frequently, applicants choose to withdraw because of the bar poll results, which provide an initial indication to them of their chances.

MR. BILL GORDON, the newest public member of the AJC, said he has been most impressed by the people who have come before him. He said he had the pleasure of voting for all four people who were before the committee now. In looking at the candidates, he

tries to keep in mind that he might have to appear before them some time. They are people who can relate to other people and that quality can't be screened through a polling process. He uses the bar poll to find areas to probe that don't make sense to him. However, he has found that he often has the same impression of the applicants as their professional peers. He emphasized that the council does not choose judges, but rather forwards the names of all who are most qualified from a particular panel to the governor who then goes through his selection process.

MR. GORDON told members that he was an executive assistant to Governor Hammond when the state was rapidly expanding and creating judges right and left. A large part of his job was to help the governor make his selection.

> We were oftentimes in the same situation that Governor Murkowksi has found himself – frustrated by the fact that we knew a very good person that was a very good supporter that we knew had good legal background, that was going to apply for this judgeship and we were shocked when the person didn't make it through the Judicial Council. The truth of the matter was we didn't have the opportunity to know the other candidates and we didn't have the opportunity to compare our preferred choice with those people who were brought to light that we didn't know that may not have been supporters, who may not have been of the same political persuasion or whatnot. The Judicial Council filtered them out; we got very good people from whom to make selections – and I think the system worked.
>
> Like the Chief Justice said, like a jury, we get the facts before us; all of us make a judgment based on our collective experiences and vote. I would never second-guess how the other members of the council have voted. They have done an outstanding job. I would have probably voted for a few others – more than they do because I don't sometimes detect the defining line as clearly as who is the most qualified person versus very qualified, but I do think the process works and the governor will always be confident in this process - no matter who the governor selects, we'll get an outstanding jurist.

CO-CHAIR SEEKINS asked how much data about an applicant is forwarded to the governor with the names.

MR. GORDON replied that the council shares all the data that is not confidential including the bar poll results.

> The process gets a little different on the third floor. I can't speak to this experience, but the experience that I had – at that point the public weighs in. I've been very surprised in my capacity as a member of the Judicial Council that I haven't received more public input – my phone ringing off the hook. I'm very thankful that it hasn't at times, but I would have suspected that there would be more of a lobbying kind of nature - which you call input - call it lobbying whatever you will – it has the same effect. The governor will get that heavily at his level, because the community becomes involved at that point and there's a lot of lobbying going on. They also do background police checks and things like that and some information that we may not have... I think the governor has plenty of information from the Judicial Council and from other courts.

REPRESENTATIVE GARA asked if he or Mr. Groseclose could think of an instance in which someone was qualified but was not good enough to be forwarded while someone else less qualified was forwarded. "What is the difference between those two levels?"

MR. GORDON replied yes; sometimes a particular person in a particular location has unique qualities suited for that location. He might be rated higher in a rural location rather than an urban one; life experiences come into play. Any area like Anchorage has its own problems. Anchorage has a heavier case load and might need someone who can manage time better and put out more work.

CO-CHAIR MCGUIRE asked if he gave any weight to racial, ethnic, gender or regional diversity.

MR. GORDON replied absolutely yes; the council has nominated several outstanding women even though they have not been successful at the governor's level. Ethnicity is a real factor depending on the vacancy location, like in rural areas, for instance. "Out of office skills, their life experience is very important to the public members...."

CO-CHAIR MCGUIRE asked him to explain the importance of diversity on the bench.

MR. GROSECLOSE replied that the judiciary "has to be color blind to some extent." He noted that quotas are not tolerated under existing law, but he was mindful that the judiciary should reflect the population as a whole. Each vacancy is limited by how large the applicant pool is. He has not heard anyone say there must be x number of types of judges. No one has said they need a certain ratio of criminal lawyers or public defenders or women.

TAPE 04-75, SIDE B

MR. GROSECLOSE said that different kinds of qualities are needed for different kinds of courts in general. He elaborated that for superior court the members look for family law exposure whereas for district court they look at those who have a strong background in criminal misdemeanor matters.

> But is there a litmus test that is employed in any and all situations? Do we have a grid that we kind of assign values to and factor people in? No. I certainly don't. But, are these factors that I consider and that get factored into the mix? Yes.

CO-CHAIR MCGUIRE noted that more and more racial and political questions are analyzed in court.

> If you only have one segment of the population representing that branch of government, I think it's fair to say at best there's a perception that the fairness isn't there, that the understanding of the particular plights of the individuals, that the diverse individuals that come before the court are not recognized. So, I think it's important... I just want people to think about it who are on the Judicial Council. We try very carefully to isolate the judiciary from the political world and yet, we realize again, human beings have political views. What underlies a political opinion is values, philosophies, upbringing and religion and we try to say it doesn't factor in and yet, over and over and over again this last two weeks you only have to look to the paper to see the number of cases that have come before the supreme court that are political in nature – 100 percent political in nature.

She hoped the Judicial Council would factor in different political philosophies that are a reflection of Alaska's population as a whole.

> I would just submit to you, whether it is politically appropriate or not, whether it makes people feel uncomfortable or not, these are the things people in Alaska are talking about and if we don't want to go to a system of electing judges, which I submit we don't, we need to start being more mindful and thinking about a place where it's appropriate for different opinions and philosophies to be reflected in the makeup of our courts.

REPRESENTATIVE OGG asked Mr. Gordon to elaborate on the criteria the council uses to choose applicants.

MR. GORDON replied that the criteria are clear in the bylaws – professional competence, integrity, fairness, temperament, suitability of experience, etc. Public members may differ from bar members in tending to look at what life experiences an applicant brings to the bench that would benefit the particular community they are in - that might separate them from some of the other equally talented in the areas of professional competence, integrity, fairness, etc.

REPRESENTATIVE OGG asked if the council generally includes racial, ethnic, cultural and gender diversity as factors in defining a qualified from a most qualified applicant.

MR. GORDON replied that it would be impossible to not consider some of those qualities. Most of the applicants are exceptional people. The areas that are measured, that are stated clearly in the bylaws and the bar poll, are those that carry the most weight. But some of the other factors come in when considering different vacancies. He thought that was why the council had public members.

MR. DOUG BAILEY, newest attorney member of AJC, said he served as acting executive director of it under Chief Justice Bony and Chief Justice Rabinowitz in 1970 – 1974 and has sat through several council matters, several nominating meetings and interview sessions with perspective judges. He worked with Mr. Gordon in Governor Jay Hammond's office where he saw the process from another perspective at times. He voiced the frustration they both felt by not receiving the names they wanted.

He reflected that he is a new vote on the council and emphasized that the membership of the Judicial Council changes over time and he personally feels no obligation to vote for someone because the council, as it was made up a year or two ago, voted to send a name up. He also said that people think of the council as a unit with everybody in lock step, but it is a group of six people who come together periodically to bring different things to it.

MR. BAILEY said he personally doesn't put much stock in the results of the bar poll. It can be helpful, however. If he sees someone who has been practicing for 15 – 20 years with a high national rating, that gets his attention as does someone who has been practicing for 25 years and who doesn't have a rating in Martindale Hubble, a national and foreign directory of lawyers.

REPRESENTATIVE GARA asked him to explain the difference between an average and an exceptional attorney and why would he want an exceptional one as a judge.

MR. BAILEY compared it to having an exceptionally talented doctor treating them for a particular condition rather than one who is just average.

REPRESENTATIVE SAMUELS asked if he thought his expertise as an attorney gives him any advantage over a public member of the council.

MR. BAILEY declined to speak for other members of the council, because they are very independent in going about their business. Non-attorney members may address other qualities besides legal skills more heavily than he would, as Mr. Gordon discussed earlier.

CO-CHAIR SEEKINS asked if he saw individual surveys or just a summary.

MR. BAILEY replied that the members see a summary and some of the comments. They get all sorts of statistics on the bar poll. If the written comments use the same words consistently, he might suspect organized opposition. He personally calls a lot of people and gets a feel for how a candidate is viewed before he ever sees the bar poll material.

SENATOR FRENCH asked how he and Governor Hammond dealt with their frustrations when good candidates were not forwarded. He

thought at one time someone who has the highest score on the bar poll should be given an automatic pass, although he has since changed his thinking.

> My question for you is back when you were in the administration and you were experiencing the same frustration, what, if anything, did you do in response to that? Did you think about tinkering with the system and if you thought about tinkering, what did you decide and why did you decide that?

MR. BAILEY replied that he recommended to Governor Hammond that he write to the Judicial Council and ask for more names. That idea didn't go anywhere and to his knowledge the governor never did that.

CO-CHAIR SEEKINS asked if he was aware of any compromise or negotiation on the part of council members in that process.

MR. BAILEY replied that he wasn't, but he could say that some of the votes were not unanimous.

CO-CHAIR SEEKINS asked what he would do if he didn't like any of the applicants who were most qualified.

MR. BAILEY replied that he couldn't imagine it, but supposed it could happen.

CO-CHAIR SEEKINS asked what would happen if the council didn't find anyone most qualified.

MR. BAILEY replied in that case he might advance the argument to reopen applications. "I just don't know."

MR. COHN said he was an applicant at one time when the council nominated him and no one else. At that time, it reopened the process for applications over a nine-month period, which was tedious for him. He knew of one other occasion when Bethel had too few applicants to find two most qualified names among them to forward to the governor.

CO-CHAIR SEEKINS welcomed Ms. Gigi Pilcher to the meeting. He asked her how she felt the process works and if there is room for improvement.

MS. GIGI PILCHER, public member who has served for five years, said she is not intimidated by any of the attorney members and

doesn't put a lot of stock in the bar poll. Aside from competence, she looks for applicants who are humble and won't be condescending; she tries to imagine how a person who had not been in a courtroom before would be treated by the applicant. She said more public input would improve the process.

REPRESENTATIVE SAMUELS asked if special interest groups, like AWAKE and STAR, the rape crisis centers, try to become involved in the process.

MS. PILCHER replied that she has been contacted only once by a group out of Palmer in her five-year period of service on the council. She said she takes the bar poll with a grain of salt.

REPRESENTATIVE OGG asked if the council members often go outside of the material that is provided on applicants like Mr. Bailey said he does.

MS. PILCHER replied that she doesn't do that. She lives in Ketchikan and is removed from the applicants and a lot of the people who would know them.

> I like to go in with a pretty clean slate and go with the material that I've been provided by the council's staff and I put a lot of stock into the interview. There's been some candidates that, I think, were at the top of the bar poll who, in my view, came across very dismal in the interview and they may have been at the top of the bar poll, but they certainly didn't get my vote based on the interview and things that came out during the interview.

She said that people can look great on paper. She doesn't put a lot of stock in the bar poll comments, because some of them are hilarious and most are anonymous.

> I really do go on the interview process, which is pretty grueling and really pretty tough. I think I've heard people refer to it as being cross-examined five times.

CO-CHAIR SEEKINS asked how many nominees she thinks the council should advance to the governor.

MS. PILCHER replied that she has no preset number.

CO-CHAIR SEEKINS thanked her for her comments and invited Mr. Katcher to testify on the last process he just went through.

MR. JONATHAN KATCHER, Anchorage attorney, said he has been practicing law in Alaska for 23 years and is president-elect of the Bar Association. He thought the controversy that started when the governor sent his letter of rejection in August has been positive. It has resulted in people reading the Constitution, the minutes of the Constitutional Convention and having spirited discussions about the selection process. Another positive result is that the governor has become more engaged in the process of selecting judges. Prior to this experience, the attorney general and lieutenant governor were responsible for interviewing the judicial candidates. He didn't think having the attorney general, who is the head of the largest law firm in the state and under whose name every pleading that is put forth by the state in front of every judge is signed, interview the judicial candidates is the way it should be done.

> But, be that as it may, having the governor's chief of staff put us through what I thought was a very thorough and appropriate interview – and, by the way, a more thorough interview than I got when I was a candidate before the Knowles administration – I thought that was very positive and he did an excellent job of questioning me over topics that anybody would want to know before they would want to make me a judge. Then, my interview with the governor was also very constructive and very positive – and, again, it's my understanding that the governor in this administration previously had never interviewed any of the candidates that he appointed to be a member of the court. It's my hope that as a result of this controversy this will be a new approach that this administration will use for purposes of appointing judges.
>
> What these judges do, and particularly the judgeship that I have been twice an applicant and candidate for, is a very tough job. These people in Anchorage – I don't know much about the jurisdictions outside of Anchorage – so I can only speak for Anchorage and about the job I was trying to get – they have a very, very tough job. They are divided into two kinds of caseloads on the superior court. You have those who do exclusively criminal work – hard, hard work – and then you have those who do civil work, which is a mixture

of family law and car accidents and contract disputes and complicated regulatory matters. This is tough work and we only want the very best people doing that work. We don't want people who are not quite the very best doing that work.

I represent clients who have a vast array of problems and issues that I bring to the court and I want to make sure that my clients are going to get the best justice possible from the most competent people. An example of how difficult the job that these people confront when they are on superior court is what we read about in the paper today from Judge [Morgan] Christen. Judge Christen had to deal with this question whether the ballot measure regarding the election, the replacement of the United States senator had the right language. This is a sophisticated constitutional and statutory question and that judge had to, in the midst of doing all the divorces and car wrecks and all the other kinds of stuff that she has to do, make way in her life to deal with, on a very short fuse, a very sophisticated and difficult issue. And whether or not we agree with the outcome that she reached, we had to recognize that in order to do it well, you have to be really good. Being good is more than smart. Being good means that you have to work very, very hard and manage and balance a very difficult caseload. In my view, we want only the most qualified people to be doing that.

The question then becomes who decides. As in every constitutional issue, it basically comes down to who makes the call. If it's in federalism, does the state have the power or does the federal government have the power. If it's in privacy, does the individual have the power or does the government have the power. And in this case, in selecting judges, the constitutional drafters in this state decided that two entities would have the power and, in my view, wisely so. They divided it up so that we would have a group of people making the decision based upon criteria that made the most sense. If you read the minutes, which I gather everybody has, that criteria was to be most qualified.

Now, one of the things that I think is remarkable about being a lawyer in Alaska, a citizen in Alaska, is that we have, right now, in this room, people that

were there – people that were part of creating this constitutional system of ours. And, I think they have done a wonderful job; our constitution is a model – not only in terms of judicial selection, but the way that our government is created and structured is a model for governments around the world. So, given that some of those people are still here, it's like being in the room with Jefferson and Madison. Being able to be in the presence of Judge Buckaloo or in the presence of Vic Fischer or in the presence of Judge Stewart, I think is just a great honor and a privilege. These people served us very well by the system that they created.

I want to close by addressing one point that Representative McGuire brought up. This is the issue of do we want to have people scrutinized or questioned on their political philosophy. While I really have serious issues with it, ours is a society of laws and not men and women. We want these judges making these calls based upon the law. We want them to interpret the law as it is passed down to them by the legislature and by the supreme court because these are the two principle creators of law outside of the constitution and we want these people making the call correctly as the law informs them to do so – not based upon their own individual philosophy, not based upon their own individual religion, but what the law compels.

CO-CHAIR MCGUIRE said she wished that could be true and she has always wanted the judiciary to be politically neutral and that is a goal they should continue to strive for. The make-up of the judicial bench should also have diversity. She is not suggesting a box that would read Republican or Democrat.

What I was really trying to get at is that a political party is more than just an association with a name or group; it is a set of values and a set of philosophies, a way of viewing the world - and that there are philosophies and values that differ among Alaskans. As you well know, you can pick any case, whether it's on abortion, whether it's on the death penalty, whether it's on a ballot measure – these issues have two different sides and both can be argued. Any skilled lawyer can see the arguments that they would make for both sides; that's part of a legal

> education and part of being a balanced and reasonable person – that you can see both sides. But, in the end, only one side can win and my point is simply not a suggestion that we move to politicizing our bench or anything that way – but that we ought to consider that the makeup of the judicial branch ought to be a reflection of the diversity that we have. I do think that there ought to be women and men and there ought to be people of color and people from Bethel on the Anchorage bench, sometime, or people from Anchorage on the Bethel bench. I think those are great things. There ought to be people on the bench that have different political and social philosophies as well. That was my point.

MR. KATCHER responded, "There are; there are people of different philosophies on the bench that bring different politics...."

CO-CHAIR SEEKINS said they are not discussing the philosophy of the state of Alaska today.

> I want to know about your experience going through the process this time around. Was it rosy? You wouldn't change a thing? Do you think that it was fair? Do you think it was transparent? Do you think it was consistent? You just went through it. I want to know what you think is the best system in the world or the model, but what was your experience?

MR. KATCHER replied:

> I would say yes, yes, yes, yes and yes. My experience was positive. I found that the council members in their scrutiny of myself was engaged, was informed and that, as far as I could tell, knew what they were talking about when they interviewed me and asked me about things that they would want to know for purposes of deciding whether or not I was qualified to be a superior court judge.

CO-CHAIR SEEKINS asked him:

> The altercation that you had with the state of Alaska that came to light, probably to most of us after the fact, was it something that was considered, that you were asked about? Did you have an opportunity to explain the process that you went through?

MR. KATCHER quickly replied, “Yes.”

CO-CHAIR SEEKINS continued, “They were obviously satisfied that it was not something that would keep you from being the best of the best in the selection process? Is that correct?”

MR. KATCHER answered:

> Well, I’d assume that since they unanimously voted in my favor, that was their conclusion, but I guess you would have to ask them particularly about why they had those votes.

He said it was the subject of a considerable portion of his interview.

REPRESENTATIVE SAMUELS said he has been the conservative attorney receptacle for input since this meeting started.

> There is a viewpoint that does lean left and it’s not about Democrat or Republican. Who cares what your party name is. It’s more the philosophy....

MR. KATCHER responded, “I think that is fundamentally a myth that there is a liberal viewpoint manifested in the members of the judiciary of this state.”

REPRESENTATIVE OGG asked if he was asked any questions that he didn’t expect in his interview.

TAPE 04-76, SIDE A

MR. KATCHER replied that he understands the question that most applicants who don’t do well flub is the question – why do you want to be a judge.

> I was ready for that one. But, I do want to tell you in the interview I had with Mr. Clark, which was really just a great time. I really enjoyed my hour with Jim Clark. He’s a brilliant lawyer and it was a real pleasure to spend time with him. The question that I wasn’t ready for that I thought was very interesting is he said that, well, tell me why we should appoint these other two people to the bench. I thought that that was a really sharp question and I went on to say I think they’d both be excellent

judges. I think, frankly, these other two members of the bar who are here to speak to you today who didn't get passed by the council, in my view - I've had direct experience with both of them – I think they would both be excellent judges. But again, I don't get the call. The council gets the call; that's the way it works.

SENATOR FRENCH wanted to briefly address the myth about the left or right slant to the judiciary.

I should probably put on the record that the house I'm living in right now I bought from Mr. Katcher about 12 months ago. The house worked out great. As a former prosecutor, I was from time to time completely convinced that the bench was arrayed against me. I just couldn't win; it was not fair. You kind of go back and kibitz the way you do in the locker room after work about what's going on over there in court. And one day we just sort of set out to find out – how many defense attorneys and how many former prosecutors were on the bench and as it turned out, just as Mr. Cohn let us know earlier today, it was 50/50. It's right down the middle. So, I think to anybody who suggests that there is some sort of slant to the bench, you just can't bear it out with any statistics. If you just stop and look at it in a cold-eyed way, the evidence is just not there to support that there's any kind of slant to the bench. It may not always go your way, but that's just the way the system works.

REPRESENTATIVE GARA weighed in that he knew one judge who shares something close to his political beliefs and only twice has that judge ever issued a ruling that he agrees with.

He rules the opposite way from me almost all the time – often on my cases when I was practicing. This whole idea that people are voting their political philosophy just doesn't carry water. It never has, at least, when I have practiced.

CO-CHAIR SEEKINS announced that Sydney Billingslea would testify next.

MS. SIDNEY BILLINGSLEA, Alaska Trial Lawyer's Association, said she would answer questions. She had three experiences with the Judicial Council – twice when her name was forwarded to Governor

Knowles, but she didn't get one of the two seats that were available, and once in this last round when she was interviewed by the governor and Mr. Clark and did not get the job.

> My experience has [indisc.] universally been tiring and thorough and penetrating. They have been disruptive of my practice to some degree, because I choose to structure – I'm a sole practitioner and I've been a sole practitioner for 10 years – I run my own business. When I engaged in the months-long process of selection, there are times when I get [indisc.] where I choose to be careful about the cases that I commit to because I may have to abandon them if I get the appointment. So, to that extent it has been a somewhat disruptive process, but one that I engage in voluntarily and I'm not sure how I could improve upon [indisc.] since it takes several months once the application goes in to the time you meet with the Judicial Council and then 45 days after that to get the [indisc.]. So, I don't know how to improve on that. [Indisc.]
>
> I would echo what Mr. Katcher said about the way it operates. [indisc.] I think I earned my numbers and I earned my EV rating, demonstrating that I'm a very qualified attorney, I'm a well-known attorney to some degree. I get a lot of responses on the bar poll probably because I go to court all the time and because I meet a lot of people in my volunteer work as a trial lawyer and my volunteer work as being a member of the Board of Governors – I'm a relatively new member of the Board of Governors. So, I feel like the more well-known one is, the better shot one has of getting bigger numbers on the polls, not necessarily better numbers. So, I think that I earned my good numbers. There are some well-known lawyers that don't do so well and that means something as well.

SENATOR FRENCH asked how a person could be the most qualified applicant one year and not the next.

MS. BILLINGSLEA answered that the membership of the AJC changes and, therefore, so does its opinions. The pool of candidates also changes as do the regions in which the positions open up. Of the three people whose names were forwarded she said the one who was chosen was at least as good a lawyer as she is. She does

not know what criteria the governor used to select him because it's not particularly transparent.

> If it were just a deeper list, if just everybody who has practiced law for five years qualified to be on the superior court went up and somebody that I thought wasn't as good a lawyer as I am or who wouldn't be as good a judge as I am got selected, I think I would be less pleased with the way the process worked. I think I would be less honored to be in the group, if you will.... I was honored to be in this group and I'm happy with the person that the governor selected, because I can see that he's among the most qualified.

REPRESENTATIVE SAMUELS said:

> I'm less concerned about...if a stronger group of candidates is up and you don't make the cut, then that's fine. Do you find that maybe more as an attorney than a candidate, do you find that bar poll differentials for different jobs – that still kind of troubles me – that if you apply for a superior court job in Fairbanks and you applied for a superior court job within a year in Anchorage – the same peer group is judging you – that the numbers should really be identical? I can understand if somebody had a bad experience or a better experience, it might fluctuate slightly, but are you troubled at all - if that has in fact happened... that the bar polls fluctuate with the same user group that is actually voting on the candidate. Do you see that as a problem, at all?

MS. BILLINGSLEA replied that she didn't see it as a problem. If that is true, the councils might vote a different number of suitability, for example.

> The other numbers should be consistent. One can assume that the bar poll numbers would be roughly the same. But then you get to the Judicial Council where some subjectivity enters in about suitability for that particular position – and maybe I'm not the best candidate or among the most qualified when I go to Fairbanks....

CO-CHAIR SEEKINS said questions were raised about several of her cases in which she indicated she had not adequately represented her clients in one capacity or another. He asked if she had

discussions about that with the Judicial Council and was that part of its consideration.

MS. BILLINGSLEA replied:

> Absolutely - it was two years ago in 2002. I know what you are talking about. It was quite thoroughly discussed in 2002, but was not addressed in 2004. That would probably be pretty redundant to do it twice, but Mr. Clark was very thorough in his questions about the two ineffective claims that I filed affidavits for and then I think you have the Sky case in front of you from Sitka, which is not in post conviction relief status at this point. I think it's up on appeal right now.... To that end, I will say that my meeting with Mr. Clark was very thorough. He was very well prepared; it was absolutely enjoyable to meet with somebody who is as complete a professional as he is. I would expect nothing less. My meeting with the governor was similarly enjoyable.
>
> I have feedback from other applicants who were unsuccessful in prior judicial openings and their experience was much less positive. They found the attorney general not particularly prepared, not particularly thorough and not particularly engaged in the selection process. So to the extent that this experience has opened up the pathway to the governor's office, I think that is wonderful. It's critical that the governor be engaged in the individuals that he selects for the bench now and in the future. I was very surprised to find out the governor was so disengaged from the process in the past eight judges he has selected for the state. So, to the extent that he is now engaged and he actually picked Mr. Stowers for the bench, I congratulate him in the process for making that happen.

CO-CHAIR SEEKINS said he understands that it's not unusual for any of the governors in the past to be relatively disengaged in the process.

MS. BILLINGSLEA replied:

> That would be a surprise to me. Governor Knowles was pretty engaged. That was my experience and I haven't applied for a judgeship before Governor Knowles' term

– but that would be surprising to me. I hope that it changes if that is correct.

SENATOR THERRIAULT asked her to explain her ineffective assistance of counsel affidavits and why the council set them aside.

MS. BILLINGSLEA explained that criminal defense attorneys, like herself, sometimes lose a serious case and their client goes to prison for a long time. Those individuals are very unhappy about that fact and engage in what is called post-conviction relief. It is fairly common in the business for those individuals to file a Rule 35, an ineffective assistance of counsel case. These cases make their way through court and generally are unsuccessful because the threshold for effective assistance of counsel is very low – in part because the people did receive very good assistance of council in the cases they are talking about. She personally holds herself to a higher standard than the constitutional standard because it is an extremely low threshold.

MS. BILLINGSLEA said she looked at the two cases under discussion and agreed that she made a tactical mistake involving jury instructions that may or may not have affected the outcome of the trial. She didn't know. The focus of the questioning was whether it was tactical at the time of the trial and she thought the answer was probably yes. In hindsight, it was probably not a good choice and she wishes she hadn't done it that way, but she is willing to admit her mistakes. That is probably critical for any superior or district court judge to do as well, which is probably why it was not a factor in finding her among the most qualified lawyers.

SENATOR THERRIAULT said she was just giving someone the benefit of a doubt and wishes the press would have reported it that way.

MS. BILLINGSLEA responded that she didn't think the public is engaged on that level.

REPRESENTATIVE GARA asked how many trials she had done and whether anyone else who had done the same number had an ineffective assistance affidavit filed.

MS. BILLINGSLEA answered that she used to do three to five trials per year and now she does one to three per year. They are generally serious felonies. She knows that public defenders and public servants are targets for post-conviction relief cases.

She guessed that they got a lot of ineffective assistance affidavits filed against them because they defend murder or serious assault cases. That is what she saw as a public defender 10 years ago.

> It comes in waves, sometimes where there is a particularly litigious person who is incarcerated who is the jailhouse lawyer. So, all of a sudden it goes around and you get dozens of them filed in a wave and then sometimes it quiets down.

REPRESENTATIVE GARA asked her what her criminal caseload was when she was in public practice.

MS. BILLINGSLEA replied as a state public defender she had between 100 to 175 cases. Now she has about 20.

MR. SCOTT NORDSTRAND, Deputy Attorney General, Civil Division, Department of Law (DOL), said he was appointed by Attorney General Renkes in January 2003 after 15 years of private practice. He supervises the civil legal matters for the state of Alaska with a staff of approximately 135 attorneys in 10 sections. He has a management team of about 10 people with a statewide office chief. He is a three-time candidate for an Alaska superior court judgeship in Anchorage and the council did not forward his name to the governor for any of the vacancies. He divided his comments into the bar poll and what happened there, the interview and what happened and the conversation with AJC Executive Director Larry Cohn regarding the outcome. His views are his own, not the administration's.

He first applied in October 2001 and, after the bar poll, five out of eight attorneys continued in the running. The AJC provides formal bar poll information to all applicants prior to the results becoming public. Those candidates with poor showings in the poll are given the opportunity to withdraw so that the results will not become public. Of the five remaining candidates, his overall rating from attorneys with direct professional experience with him was 3.7 out of a possible 5 points – about the middle of the pack. His overall rating among judges was 3.8. He provided a chart summarizing his bar poll ratings to the committee.

During his interview with the AJC, which was held in private, although he was asked if he wanted to hold it in public, it was clear that a public interview was not the norm or the method preferred. He was given the opportunity by the Chief Justice to

make an opening presentation on why he believed he would be a superior court judge. Each of the council members took turns asking him questions. The questions were not standardized but seemed specific to him. They included questions about the bar poll, which were generally positive, questions about a few negative written comments from the bar poll, and positive comments were discussed, too.

> The council's questioning focused on the breadth of my legal experience, particularly the lack of criminal and family law background. It was suggested that I consider continuing legal education of pro bono work to broaden my legal experience. Other professional questions concerned my trial and appellate advocacy experience and my writing sample. The council seemed to like my new supreme court brief that I had submitted. I was asked about my hobbies and I was, in fact, asked about my political activities... All in all, the interview was positive...and I left with a sense that I had done quite well.
>
> Then comes the call. Larry Cohn called me after the council voted on the applicants. He told me that my name would not be forwarded to the governor. According to Cohn, the council was very impressed with my intellect, experience and interview. He reiterated the council's concern that my [indisc.] experience was somewhat narrow, but made it clear that the council believed I would be a good superior court judge. I was just not the most qualified in this group. Most surprisingly, he revealed that the council had actually voted unanimously to request that I reapply in the future. Cohn said he was reminded that most judicial candidates apply several times before their names are forwarded to the governor and, therefore, I shouldn't be too disappointed.
>
> Bob Groseclose, an attorney member of the Judicial Council, called me a few days later. He conveyed essentially the same views and encouraged me to reapply.

He applied for two superior court vacancies in July 2002 – less than 10 months after his first application. The bar poll and interview took place just a few months before he left private practice to become deputy attorney general. The September 2002

bar poll resulted in 18 candidates, a large group, and his overall rating was in the middle of the pack at 3.5 with a much wider range from high to low from 4.2 – 2.8. His overall rating among judges was 3.4. His second interview with the Judicial Council was little changed and it was very positive and focused on his specific legal qualification. However, he knew the competition for the two spots was fierce.

Mr. Cohn again called on the same day of the interview and told him his name wouldn't be sent to the governor. The remarks were positive, but he was told if his horizons didn't expand beyond his current practice, it would be difficult to be nominated. He was given the impression that a civil defense lawyer with no criminal or family law experience, however competent, was unlikely to be the most qualified in a group of applicants.

His third application for superior court was in April 2004 after he had been deputy attorney general for 15 months. On June 8, 2004, he was called by Mr. Cohn who suggested that he withdraw his name from consideration to save himself the embarrassment of a low bar poll rating becoming public. His overall rating plummeted to 3.0 – last by half a point among nine candidates. He was disappointed and shocked by the bar poll numbers. He was told there were many positive and negative comments. The negative comments, both anonymous and signed, referred to him as overbearing, negative, arrogant, bullying and politically motivated. "No context to the criticisms would be revealed – only the generalities." He declined to withdraw his name.

He asked the committee to look at the summary of his bar poll results. The first chart summarizes the primary ratings utilized by the council engaging candidates – everybody's rating in all the categories and an overall rating for folks with direct professional experience with the applicant.

> Among only those attorneys with direct professional experience with me, my ratings declined over a two and half year period as follows: professional competence – down .4; integrity down .6; fairness down .9 – this is out of a 5 point scale, by the way – judicial temperament down .8; suitability of experience – now this is extraordinary – I become deputy attorney general for a year and a half after having the same job essentially for 15 years – suitability of experience down .6; overall rating down .7.

The bar poll data provided to me also and this goes to the second chart here, contains information on how many attorneys rated each candidate at a particular level and this is very interesting stuff. In other words, who picked number 1 for you, 2 for you, 3 for you, 4 for you. How many people said you are a 1 versus a 4 or 5 rather than just an average. That's what you'll see reflected in these second two charts. The bar poll data provided to me contained information on how many attorneys rated each level at a particular level, only for one category...the overall rating with direct professional experience – not all the other categories – competence, integrity, fairness, just the overall rating at the end....

The second and third charts summarize that data for my three applications for judgeship. As you can see in the first two bar polls, a small number of respondents gave me an overall rating of 1 and 2.

An overall rating of 1 means you are poor. You seldom meet the standards of the profession. An overall rating of 2 means you are deficient. You occasionally fall short of professional standards.

A review of the bar poll for the recent vacancy, the second chart I have here for you... demonstrates that every candidate of the nine other than I had a small number of 1 and 2 ratings – much like my first two bar polls. The number of 1 and 2 ratings for the other candidates in this bar poll was from 17 to 45, if you add them up. In my prior two bar polls, the average is 21, but now look at my current bar poll – 101 respondents or 43.7 percent of all those rating me now think I do not meet the minimum standards of the legal profession. There is a complete lack of any trend in the data to support the mean or average rating and this is kind of technical....

Statistically valid surveys generally form a bell-shaped curve over the average.... You can see that phenomenon in the other candidates' ratings.... You can see it in my prior two bar poll ratings. But in my current poll, my votes are essentially a flat line. Approximately the same number of attorneys rated me as a 1, as a 2, as a 3, as a 4 and a 5 – flat line.

Finally, take a look at the last chart on my summary. First, let me set the stage. As deputy attorney general, I do not appear in court. From the time of the September 2000 bar poll until now I recall no direct professional contact with any judge with the exception of one meeting with the civil superior court judge on the civil division's continued participation in a therapeutic court. That meeting resulted in the action desired by the judge. It was a good meeting. So, I was surprised to see that based upon direct professional experience – this isn't just folks by reputation or meeting you in Costco. or something – the judges responding lowered my overall rating from 3.4 to 2.5 over that period of time. All this time I had no direct professional experience with any judges. All the other judge ratings dropped precipitously as well – even more if you can imagine. Even my suitability of experience rating dramatically declined from the judges over that period of time with no contact with them at all. Now obviously, there could be different judges voting, but one would hope that the instrument is sufficiently useful that that wouldn't be the case – that you wouldn't just have something get completely out of whack by a few judges changing out or something in the system.

Each of you can draw your own conclusions, but I find these comparisons extraordinary. What questions does it raise for the committee? First, were all the attorneys who responded to this anonymous bar poll being accurate and truthful in their ratings? A few folks righting a perceived slight from the past or tanking one candidate to help a friend can be expected. I think that's what those 20 or 30 people that tend to be in the ones and twos for most candidates involve. But this goes well beyond that.

Second, what explanation is there for the generalized belief among attorneys and judges that I now regularly fail to meet the minimum standards of the profession other than my position as deputy attorney general and public nature of the issues I undertake on behalf of the department's clients? That leads me to my third and final interview with the Judicial Council.

On August 9 of this year I was interviewed again. The chief justice once again asked me to make an opening

presentation. As in past interviews, I went through my legal resume and described why I think I will make a good judge, but this time I ended with a very direct discussion about the bar poll. It was described by them as the elephant in the room. They had to talk about it. I made a statement along the lines I did here about the bar poll. I gave them this very summary....

Then the council began questioning me one by one. After being invited to reapply and twice previously interviewed, the tenor and the substance of the questioning in this interview were much different. There were no questions from the council concerning my 15 years of private legal practice prior to joining the Department of Law – nothing concerning my trial experience, appellate history or writing skills. Neither were there questions about the breadth of the legal issues I now face as deputy attorney general. Given the council's prior concerns about my experience and the scope of my experience, I assumed this would be of great interest – my supervision of CINA cases, juvenile delinquencies – all of these things that were concerns before are now areas that for a year and a half I have been supervising attorneys who do it. I thought it would be interesting, but it wasn't. Rather, the theme of the council's questioning was the bar poll in general and anonymous written comments from the bar poll in particular. Although the details of the written comments were not shared with me, council members quoted or distilled the comments in short phrases like arrogant, bullying, too political. I was repeatedly asked to comment upon and explain these comments. Literally they would say it says arrogant, arrogant, arrogant. What is your response? I did the best I could to refute the charges, but in the absence of any context for the contents, it's a difficult task. Through the council's questioning, it became clear that many of the negative comments related to the 2003 reorganization of the management team in the civil division and related personnel decisions made by the attorney general. I explained at some length how we reached the decision to reorganize, including the independent report from the Conference of Western Attorneys General that made the very recommendations we implemented.... I acknowledged that personnel decisions disappointing to some were made,

noting that the management team of more than 20 attorneys was reduced to 10. I was asked how this reorganization was implemented right down to a discussion of my interaction with line attorneys in their offices – when you go into their office how do you act – that kind of thing. Again, there were no specific complaints offered. Just the allegation that civil division attorneys were generally dissatisfied with my style of leadership – all apparently based upon these anonymous written comments. I responded to the charges at length and commented that my overall rating among government attorneys, which is where the civil division lawyers would be, was at 3.2, slightly better than the average. So, perhaps they weren't quite as upset as was suggested – at least not all of them.

Some of the other questions posed by the council were unusual and I think this goes to the odd questions that may have been asked. First, one public member, again referring to anonymous written comment, said it says here you support conservative Republican policies. Is that true? I was truly surprised by the nature of the question and I cite the reference in there to bylaws that suggest there shouldn't be partisan political questioning. Nonetheless, I confirmed that I was a Republican who worked for a Republican attorney general and a Republican governor. I explained that I do not set policies for the administration, but when asked my opinion, I generally agree with its policy goals. I went on to note that the deputy attorney general of the civil division has an important role in advancing the governor's legislative agenda as the attorneys drafting and advocating his legislation work in the civil division. I cited the governor's recent reform proposals regarding the Alaska Workers' Compensation Act, the Alaska Human Rights Act and the Public Employment Relations Act as examples of legislation that proved controversial to some groups and many lawyers – and we certainly all remember those days.

As most of you know, I was very involved in all these efforts and I told the council this might have affected my rating by the bar. Then the same council members asked another question – whose idea was the Workers' Comp reform bill. Again, taken back by the

question, I explained that its genesis within the Department of Law was with the attorneys who defend workers' compensation cases on behalf of the state. I took their ideas to the administration and began a process that resulted in the governor's bill.

The second series of political questions came from an attorney member. He asked whether I was aware of the controversy surrounding the former Alaska Oil and Gas Conservation Commissioner, Randy Ruedrich, specifically his disclosure of an attorney/client privileged document to an outside attorney. I said I was aware of the matter. Who couldn't be, I suppose? I then asked whether the Department of Law had referred the attorney in question to the Alaska Bar Association for ethical violations in connection with keeping the document. I said I did not supervise that investigation and was unaware of whether such a referral was made. Furthermore, I noted that if I was aware of such a referral, bar rules would prevent me from revealing that fact. There is a bar rule site in the document. I'm sure the lawyers here are aware of that. Not satisfied with my answer, the council member asked if I had been in charge of the Ruedrich investigation, would I have turned in the attorney for ethical violations. I explained that the Department of Law often consulted with bar counsel on ethics issues and I might have enquired, but I did not know whether professional ethics precluded receiving a privileged document.

The final question came from another public member who noted my close connection to the Murkowski administration and asked, 'If we send your name to the governor, do you know what advice the attorney general will give the governor regarding this appointment?'

I said I had no idea what his advice would be, but I was hopeful that the quality of my work as deputy attorney general in the past year and a half would have a positive influence on the appointment decision. On a related note, an attorney member asked whether my use of two 'political appointees' as references was inappropriate. Again surprised at the question, I explained that my use of Sean Parnell, the deputy director of Division of Oil and Gas, as a personal reference was based upon my close friendship going

back nearly 20 years. The use of Greg Renkes as a professional reference was based on the fact that he is one of only two bosses I've had in 17 years. I did put down my other boss, Tom Owens, as well. So, anyway you have to have three; so I had to find somebody who wasn't one of my bosses and that was Tim Lam, an attorney here in town. At the conclusion of the interview, I was asked if there was anything that I thought could be improved in the selection process. It may have been Mr. Groseclose who asked that. He said he often does. I explained my concerns about the anonymous bar poll and comments. The chief justice then asked me, 'Why do you keep applying?' I returned to the comments that I made at the outset of the interview and expressed my belief that the experience, skills and temperament that I would bring to the bench would serve Alaskans well.

Later that day, Larry Cohn called me to let me know that once again my name would not be forwarded to the governor. He said that the council determined all the applicants were qualified to be a superior court judge, but only three names would be forwarded as the most qualified. He told me that this interview was very different than my prior two. I agree with that. The council, he said, had no further concerns about my level of experience and it continued to believe that I was competent and qualified to be a superior court judge. In fact, the council was not, as he put it, hung up on my bar poll results. He noted that it made no sense for my suitability of experience rating to dramatically decline after becoming deputy attorney general. But, according to Cohn, the council had one matter it could not overcome – the negative written comments from the bar poll. He said I did a good job in responding to the questions about the comments, but it was not enough. I asked how many comments there were and whether they were signed. He would not be precise, but he said there were between 15 and 30 negative comments – some signed and some not. He noted the comments largely concerned decisions made by the attorney general regarding the civil division since I became deputy attorney general. Again, he would give no details, but he concluded by saying, 'Absent those comments, you would have sailed through the council.' I asked what he thought I could do better next time, but he offered no practical way to effectively respond

to anonymous comments from the bar poll. Unlike our previous post bar poll conversations, I got the distinct impression that he thought further applications might be futile.

I will conclude my remarks with some observations. Again, these are my personal opinions, not those of the administration. [End of Tape]

TAPE 04-76, SIDE B

MR. NORDSTRAND continued:

...and the fact that apparently they weren't hung up on me being dead last by quite a while. Curiously, the 15 to 30 attorneys who made anonymous comments about my character and qualifications, the comments they couldn't get by, are among the very same attorneys who rated him low numerically, which ratings were deemed suspect. It's the same people.

Many of the candidates for the bench are qualified competent attorneys who would make good judges – probably most candidates. In the present case, the council concluded that all nine candidates meet those criteria. But once that threshold is met, the council must separate the qualified from the most qualified. From my experience in the process, that is the point where the bar poll can have its greatest impact. But what are you going to look at? If the bar poll provides fair, accurate and reliable information, then the most qualified will be chosen – if it does – under that scenario. All things being equal, this guy did a little better than this person. Otherwise, we face the risk that many qualified candidates and even some of the most qualifying candidates will not be nominated to the governor, because of situations like this. Sorry to be long-winded, but I wanted to be precise.

REPRESENTATIVE GARA observed that what jumps out at him is:

Your first two times in 2001 and 2002 - if you look at the page where they have the Alaska bar poll results for Scott J. Nordstrand – The first two times you applied before you started working for the current administration, 120 people responded. That's 120 people who had direct professional experience with

you. Your poll ratings then were 3.5, 3.7. The next time was a year and a half after you had started working for the administration. You had worked on political issues for the administration – been sort of a point person on a number of issues. And, at that point, the number of people who had direct professional experience with you – you had gone from private practice to now somebody who did private and public practice – the number of people who had direct professional experience with you doubled. It went from 120 to 231. That explains the jump and I've been informed that the jump is largely among people in the public sector, people who possibly worked in the attorney general' office or somewhere in the public sector. The statistics were that this jump was primarily made up of additional people who worked with you in the public sector, who ran into you in the public sector.

And, I guess, I'll ask you this and ask you to respond. It seems to me the most important aspect I would consider in reviewing a judicial candidate is whether they're going to be impartial – whether they can leave their politics at the door. And so for a year and a half, you had taken on a very political job and in that year and a half had run into an extra 120 people who got to rate you. Why should I not infer from this that a number of additional people determined that your political philosophy was very important to you and that maybe you would have a hard time being impartial as a judge. I will just leave it with this. I look around this table and if all of us had legal experience - I can think of two people at this table, including you, who I'm sure would be impartial in my case - if I had a case before them, but I think most of us - we've entered this political world and we've created the impression to the rest of the people that we're partial now. With that, I would just ask you to respond to those thoughts.

MR. NORDSTRAND responded that he could be correct, but that is part of the question being discussed – if it is possible for someone like the deputy attorney general, who has a political point of view, to run for judge while continuing to carry out his duties to advocate for the governor's legislation.

It gets to the point of how good is the tool, if it's subject to that level of foible. Remember attorneys now respond to this – and it says right at the instructions that you are required under the ethical rules to answer truthfully and honestly. The question is whether or not there really are 100 attorneys that I have dealt with in a direct professional way who really think that I seldom meet the standards of the profession. I mean we don't have the other detailed data, so I can't tell who voted for 1 and 2 in these other categories. I suppose the council has it and maybe it could be obtained. That would be interesting. But at the end of the day, that's what's troubling about this. How do you solve that problem? How do you compel accuracy and honesty in this process? You know I think I am a bit of a lightening rod and so all that really happened here, I think, is the flaw was accentuated, I think. I think the flaw exists in lots of ratings that are going on only in smaller ways. I think this is just apparent to me. But, I think you're right. I think it could be the fact that I have political views that are known and people know that and they view – apparently being a Republican advocating the governor's legislation and point of view means that you seldom meet the standards of the profession now – at least to 40 people. That could be right. I don't know.

REPRESENTATIVE ANDERSON complimented him on how good it was to work with him during the last two legislative sessions – it was exceptional. Supplemental to Representative Gara's question, he asked how many attorneys receive the poll.

MR. NORDSTRAND replied that there are 2,500 lawyers in the bar.

REPRESENTATIVE ANDERSON said he sees Mr. Nordstrand's situation as one that highlights that suddenly another 80 extra attorneys responded and they were in the 1 and 2 category.

So, it was almost in my opinion like a punitive thing. I don't know how anyone could not say that otherwise. That being said, if you were to accept that or not, is it your opinion that this has a chilling effect – what's happened to you – on what you appear from the record as a qualified judicial candidate accepting administrative jobs – I mean with Mayor Begich, with the legislature as majority/minority counsel, whatever

level attorney in whatever department. Who would want to if they read this?

MR. NORDSTRAND replied:

It's an interesting thing, because one of the comments I recall now that was – I think it was offered as a negative comment – one of the anonymous comments said, 'He just became deputy attorney general so he could become a judge.' Now, I don't know that it's against the law or even bad that I progress. I was counseled to gain broader experience and I can't think of another job where I could get broader legal experience than being deputy attorney general. I don't know what it would be, maybe attorney general. That would be the only one I suppose. So, it's kind of – I thought taking this job – bright-eyed, bushy tailed, brand new deputy - thought this will be good, you know. I'll get to know more people - more people will get to know me. The Judicial Council will see that I'm broadening my horizons - that will be good. I've had a good experience there. And so I kind of thought the bar poll is either going to be very good or it's going to be very bad. Because there was this in the back of my mind, you know, I'm out in front of a lot of these issues for the governor and the attorney general and what if people don't like what I'm saying? Not how I'm saying it, trying to be respectful, trying to do a good job, but what I'm saying. What if they don't like what I'm saying? I guess I found out. Yeah, it could have a chilling effect, although it's probably not on a lot of jobs. My job is fairly involved, but I would think deputy commissioner jobs and those kinds of things where you might have a lawyer, deputy commissioner jobs, governor's office jobs, where you might have lawyers doing the work. You ought to think about it.

REPRESENTATIVE ANDERSON said he had an exposure in his year and a half to all the parameters.

MR. NORDSTRAND added:

I'm just telling you my story. It may not be the same for anybody else, but the civil division is the largest law firm in the State of Alaska by about 8 or 10 times. We have 135 lawyers, you know, an equal

number of staff and paralegals. So, when you come into office and you want to change some things, which the attorney general did, and I think justifiably, empirically correctly, change is hard. Government doesn't take to change that well and lawyers in government don't always take the change that well either. There's an awful lot of unbelievably hard working intelligent lawyers who work for the Department of Law. But, that being said, we did change some things and that causes some problems. But when you're running the biggest law firm and there's only 230 people who vote for you and 135 lawyers work for you, it's kind of an interesting situation.

REPRESENTATIVE ANDERSON said, "My favorite attorney general is still Doug Bailey."

REPRESENTATIVE SAMUELS said:

The thing that kind of troubles me is that nobody likes the boss. That's the way it is, but the last one on your chart where if you had no more experience with the actual judges themselves and your ratings across the board dropped, that is pretty troubling and just the questions that were posed by the commissioners themselves seemed to be on policy questions that you should have been posing to the governor himself. You know, I didn't particularly care for the workers' comp bill myself, but you shouldn't get blamed. It appears - I'm sure there is another side to it also, but to get asked a political question is troubling unless everybody got asked political questions or religious questions.

CO-CHAIR SEEKINS asked if there was any breakout that he was aware of on the bar poll responses other than location or judicial. "Did the Fairbanks community all of a sudden turn out against you? Did the Juneau community all of a sudden turn out against you? Where was the change? Do you have any idea?"

MR. NORDSTRAND replied:

Yes, actually the detailed information that's provided – it's a great big chart by each candidate. They go by judicial district and they can find out where you're popular and where you're not. In fact, the fourth

judicial district clearly had a problem with me – Fairbanks. I was rated overall 1.4 in Fairbanks.

CO-CHAIR SEEKINS asked him what he did in Fairbanks.

MR. NORDSTRAND replied:

The problem is a lot of issues come up when I employ 135 lawyers that are personnel matters, that are reorganizational matters, that I know people might not feel went the way they would like.

CO-CHAIR SEEKINS asked:

Are you feeling as if some managerial decisions that were made in the department were reflected in the comments on the bar poll – that had nothing to do with your legal qualifications?

MR. NORDSTRAND replied:

There is no question about that. The questions from the council members went to what's wrong with your management style? Why are these lawyers saying these things? I got the impression they had specific information. They won't share it with me, of course, to maintain the anonymity because – that's the hard part of this. They say well, people say you're arrogant. Tell us why you're not. Well, that's a hard question. I mean I don't know how to do that.

CO-CHAIR SEEKINS quipped, "I know a lot of arrogant lawyers."

SENATOR FRENCH said he thought the bar poll has its greatest impact because that is where the council separates the qualified from most qualified applicants. He said that he had an issue with the council more than once when the highest rated candidate couldn't get forwarded to the governor. He asked him to comment on how that experience jibed with his seemingly low bar poll rating, which kept his name from being forwarded.

MR. NORSTRAND replied that he understands that the low bar poll result didn't keep his name from being forwarded to the governor; the numbers were deemed to be sufficiently "funny" to not hold him back. But rather it was the anonymous negative comments. When he says bar poll, he is talking about its whole

structure – the numbers, the written comments - some sign the written comments and some don't.

> If what I understand is true, then that did prevent me from going forward. I apparently cruised through the council absent these comments. Now, I don't know if anybody is going to ever be absent all comments. I don't think I was the first two times, either. If that can have that effect on one candidate, then the question becomes how good is the instrument that we're using for that? How reliable? If we don't trust the 100 people who check 1 and 2 and we say, 'Jeez, that looks funny. Why would that be?' Then why do we listen to their written comment on the opposite side of the page that says, 'I don't like him – too political – whatever. Why wouldn't we say the same thing about that and that's what I didn't quite understand about the process here, but it all goes back to this whole idea of anonymity. Anonymity has good points and it has bad points. Good points – you supposedly get the honest view point without any worry about somebody finding out I said whatever about you as a candidate or about Representative Gara as a candidate or about me. On the other hand, it can be a license and that's where it becomes dangerous because people they don't know check direct professional experience and give him a 1 because they've got a guy whose running they would really like to help out. You know that would help out. When you've only got 120 people voting doing that, two, three or four people doing that, how much do you trust every member of the bar to be completely honest and accurate about this stuff? That's what it comes down to.

SENATOR FRENCH asked what constructive ideas he had to offer.

MR. NORDSTRAND suggested making the bar poll transparent by requiring all comments to be signed so they can be useful rather than manipulated.

> The question is whether this is a really useful tool or can it be manipulated and if it can be manipulated to affect one candidacy, do we keep it for all the rest just because it's pretty good for them? I don't know. I would say anonymous written comments ought not be considered at all.... The ones that are written, if they really are substantive... and they've got a

context.... You can't respond to generalities. I have talked to other candidates who have had this same trouble, maybe not the same words, but the same idea. It's just a characteristic. Please refute this characteristic and it's impossible. That's one thing.

The second thing is transparency in the process. I would say have all of the interviews in public and make them a hearing. We don't need to do any more of these in conference rooms. Put them in a public room like this and have the interviews where people know about them, can come and watch them.

The questions that I gave you, because I know you were interested in the kinds of questions that may be out of line – that's not to say that there weren't lots and lots of other questions that were perfectly appropriate. I'm giving you the examples, because that's what I think is of interest. But there were lots of questions that were appropriate. But isn't the best way to insure that folks don't ask goofy questions like do you really support conservative Republican policies. The best way to get out of that is to just have it be in the public. KTUU is in the back and somebody says that – well, you can't ask that. But that doesn't happen because it's now private and I know there's this option where you can make it public, but how would you like to be the one guy out of nine who says I want mine in public? I don't think that's a good idea. I'd say the better way to make the process is to encourage more public hearings like you've talked about – greater participation, put the application, the interview process in public, maybe even put the deliberation process in public. Why not? We've managed to come up with a whole lot of federal judges in a system in Washington where they debate it right out in front of God and everybody who ought to be a good judge or not.

The argument for making it private is there are personal matters that are discussed. I've never had a personal matter discussed. The impression I get of what the personal matter is these comments. People don't want to have a hearing where they come in say you're arrogant and you're a bully and you're this. I think that's the personal part that we're trying to protect.

> It's not the part of the application where you tell how much money you've got in the bank or don't have in the bank. Sure there are provisions in the Open Meetings Law to allow an executive session for truly private things – money, family issues or health issues, that kind of thing. Why would we have a discussion about things like people say you're arrogant? Why would that be private? If that's a real issue, I would think that ought be the most public debate. So, those are the two things that I would personally suggest – open up the bar poll – you want to vote, you got to say who you are.
>
> There's a tendency to think this is like an election, so we ought to have to keep it anonymous. This isn't vote yes or no for Scott Nordstrand. This is rate Scott Nordstrand honestly, under the rules of ethics. That's what this is; it's not an election. The same concerns about anonymity, while I understand them, can create mischief, at the very least.

CO-CHAIR SEEKINS speculated that he could see reasons for anonymity because he might be appearing before him in the future.

MR. MICHAEL COREY, Anchorage civil attorney, said he handles insurance defense and personal injury issues. He pointed out that one member of the council was not present when it voted for him and that a majority of members have to vote; the chief justice breaks a tie. He said:

> I thought that the process with respect to me was fair. I thought that I was shown a great deal of respect. The applicants know who voted for them and who voted against and I don't think that's really necessary in this context. But knowing who voted for me and who voted against actually in my mind only heightens my respect for the process, because as it turns out, some of the individuals who did choose not to endorse me were the very people who showed me the courtesy of engaging me in the discussion longer than some of the others who did vote for me and so, it clearly was not something that they had pre-planned out of hand to simply dismiss me and my application. So, I thank them for engaging me in those areas where they thought there were issues that needed to be

addressed. What they don't do is they don't talk to you about all the comments where they pat you on the back. It's really not necessary; it's those comments where somebody maybe challenges your lack of experience in a particular area. For me, that was in the criminal section. I don't have any criminal experience. In fact, I rather pride myself not being in criminal matters. The point is that was one of the areas and they did engage me in that.

REPRESENTATIVE GARA asked if the council "didn't take it out on you that you're a registered Republican."

MR. COREY replied that he didn't feel that:

The people that come to that council, as with any body, come to that with a certain sense of life experiences that they have developed. I think that when somebody is trying to pass on whether or not they think someone is qualified for a certain task, I think it's human nature to think that they, themselves, are qualified and so they use themselves as a standard. So, if you have a certain collection of people who come more from one walk of life than another and you're being judged by those people and you do not most closely compare with those folks, I think there's a tendency for other people to think that that's skewed against you. I think that's human nature. I don't think anybody said oh well, Corey is Republican. He's out. I didn't get that sense at all, but I do understand that there is at least that appearance, but I don't think it had anything to do with it in my situation, but I'm not nearly as controversial an applicant as maybe some others may have been.

REPRESENTATIVE SAMUELS asked if he was asked any questions regarding political affiliation.

MR. COREY replied no. He added that he recognizes there are boundaries to the kinds of questions that are asked, but the job of being judge is sufficiently important that a person's entire life should be an open book.

My own personal view is that this job – the one of being a judge – is sufficiently important that your entire life should be an open book. At least, that's my view. I wouldn't care if you held this in Sullivan

Arena and you asked me the most private questions around, because I think the populace that you are going to judge is entitled to know that. That's just me and I wouldn't impose that on others. But, if we're talking about solely me, I would be willing to submit to that level of scrutiny.

REPRESENTATIVE SAMUELS asked if he agreed with Mr. Nordstrand's assessment that the bar poll should be signed and the hearings should be open.

MR. COREY replied:

I am not here to try and lobby for any particular changes, because I think actually we have a pretty darn good judiciary produced by this process. I suspect that if I were the one serving as czar over this process, I would say that unless written comments are signed, I would disregard them completely. Because I think if somebody is unwilling to affix their name to comments, they should not be given really any weight. It's the whole idea of cross-examination. You have to face the music. If you're willing to make a statement about something, you have to be, in my view, willing to back that up when somebody who may not have the same views that you have want to question the reason, the rationale, the underpinnings of those views. Whether or not it's public or private, I have kind of already answered that question, because at least my own personal view is that I wouldn't mind doing that in public. But I don't know that I feel so strongly that I would impose that on others. I don't see the problem. I understand that Mr. Nordstrand – I mean I listened to what he said – I understand that he feels snake bit by the process. I'm not here to either fix it for him or try to change if for him or for anybody else. Depending on how you look at the numbers, maybe he got a bum rap, maybe he didn't. I'm an advocate; I could construct an argument either way. That's what's expected of me. Some of the concerns that he raised, I think, are legitimate, but I've never served as council member. So, I don't know what I personally would do with a bar poll.

Let me say this, if the bar poll controlled whether or not his name went to the governor and if there was something afoot – I don't mean something that sinister

> – but if the bar poll really was skewed unfairly, then yeah, that part of it should be fixed, undoubtedly. But, I don't mean to champion his cause or to criticize him either. Clearly, he feels strongly about his experience and I feel strongly about mine. I feel that I was given a fair shake....

CO-CHAIR MCGUIRE closed the meeting thanking everyone for their comments and said holding this meeting was a difficult decision. She and Senator Seekins decided that the level of public concern, both pro and con, rose to a level that they felt an obligation to bring the issue to light. She emphasized that the people attending the hearing came at their request. "I don't think anybody came here with an axe to grind and I think we all learned a lot."

CO-CHAIR SEEKINS asked Mr. Corey if he said the process is working well and encouraged them to think about putting it more in the open.

MR. COREY replied that is accurate.

> In terms of the openness, I think it's more a function of accountability. If someone chooses to make written comments, I think they should sign them or they shouldn't make them at all. I think to be fair to the applicant.... I could get to live without me personally knowing who said what, because it would help the council to perhaps be able to question me. But I think if someone is unwilling to sign their name to written comments, there's too much chance for them to hide behind the process. I personally don't think that's fair.

CO-CHAIR SEEKINS said he struggled with that, too, because he understands the need to have a certain level of anonymity when there could be retribution – for making an honest comment. However, he also understands how anonymity can be used as a weapon unjustly. It's very difficult to find the balance.

MR. COREY said he is not advocating that the individual applicants be provided the comments along with the names, but that accountability should be to the council. To protect against that retribution, the applicant could be precluded from seeing that.

CO-CHAIR SEEKINS said in terms of his own appreciation, he appreciated every member who took the time to come to this meeting. He emphasized that the hearing did not have to do with Mr. Nordstrand's name not being forwarded.

> Anyone who would attribute that motive to me doesn't know me, doesn't understand me and is making a very serious mistake. I'm not accusing you of that. I just want to put it on the record.

There being no further business to come before the committee, CO-CHAIR SEEKINS adjourned the meeting at 5:13 p.m.