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The State Courts and Alaska Politics: Independence, Public Accountability, and Political Influence

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★ CHAPTER 17 ★

The State Courts and Alaska Politics: Independence, Public Accountability, and Political Influence

Michael L. Boyer

The judiciary, or court system as it is often called in Alaska, is established in Article IV of the Alaska Constitution. It is part of the triad of strong and often contending branches of Alaska state government that is identified in Chapter 2 as one of the characteristics of Alaska politics. Yet, unlike the legislature and executive, much of the day-to-day work of the courts, including the Alaska Supreme Court, has nothing to do with politics. Courts spend the vast majority of their time resolving private disputes and enforcing criminal laws.

Sometimes, however, the courts make judgments that have far-reaching political and policy effects, occasionally leading to major conflicts with the legislative and executive branches. Occasional political fallout from judicial decisions is not surprising because courts play an important role in regulating society, defining individual rights, mediating between competing public policy goals, and developing legal rules in areas in which the legislature has not acted. Moreover, decisions of the Alaska Supreme Court are binding legal precedent on matters of state law. Plus, the courts have the power of judicial review to pass judgment on the constitutionality of statutes and executive regulations, and on occasion have invalidated them.

Most fundamental in shaping its inevitable involvement in politics is the fact that, although Alaska's court system strives for independence and impartiality, it is subject to many of the political pressures explained throughout the book. Thus, in some court decisions there is an unavoidable policy outcome. Add to this that the court system must vie for its budget with the two branches upon which it often passes judgment, that its judges must face the electorate periodically, and that the people of Alaska could ultimately restructure the judicial system through one or more constitutional amendments, then the complexity of the courts' role in Alaska government and politics becomes even more obvious.

We begin with an explanation of the chapter's theme: How does the Alaska political and governmental process deal with the tension between the need for judicial independence, public accountability, and the court system's role in politics and public policy making? The following two sections explore the influences that have shaped the Alaska court system and its organization. The next section explains the devices that work to promote independence and impartiality. Then we explore in more detail six aspects of the role of the courts in Alaska politics and policy making.

1. JUDICIAL INDEPENDENCE, IMPARTIALITY, AND THE COURT SYSTEM'S POLITICAL ROLE: AN OVERVIEW

Together with freedom of association and expression, an independent judiciary is one of the hallmarks of a pluralist democracy. In this context "independent" means freedom from control, interference, or influence by the other two branches of government, political parties, interest groups, and any other forces, political or otherwise, in making decisions. The courts need this independence to pass judgment on a host of cases both civil and criminal, to protect the rights of citizens, to enforce the rules of government, and to curb the power of government if it goes beyond its constitutional and statutory authority. Independence is usually achieved by providing for a certain amount of security of tenure for judges.

In theory, at least, independence is bestowed on a judiciary in a democracy so that it can act with impartiality in making judgments and interpreting the law and the constitution. However, laws and constitutional provisions are rarely, if ever, black and white, but are subject to various interpretations. It is interpretation that determines the outcome of many cases coming before the courts for a decision. This ambiguity in the law is the root of the policy-making role of the courts as well as the explanation for much of the political controversy that often surrounds the judiciary.

Alaska's approach to balancing judicial independence with judicial accountability to the public combines two elements: (1) a selection process that is based, theoretically at least, on merit and not the political perspective of the candidates; and (2) periodic reconfirmation of judges by the electorate. This approach is a compromise between the federal system of lifetime tenure and the purely electoral system used in many states. Alaska's system neither eliminates political fallout from court decisions nor completely insulates the courts from political pressures. But compared with many states, it does reduce the intensity of politics surrounding the judiciary.

There are several ways in which the judiciary becomes involved in politics or affects public policy, but five are particularly important. The first two are by far the most significant when it comes to political impact and likely political fallout.

First, the courts interpret the state constitution, interpret and pass judgment on the constitutionality of state laws enacted by the legislature, and interpret regulations adopted by executive departments. Courts are also called upon to decide whether executive officials have acted constitutionally or within the limits of state laws. Laws, regulations, and executive decisions frequently create or affect public policy, and sometimes the policies are major ones. As a result, judicial decisions concerning them may have significant policy implications. A few examples include cases affecting personal privacy, subsistence, Native sovereignty, prisoners' rights, and eligibility for the Permanent Fund Dividend (PFD). Some of these decisions are the result of cases being brought by interest groups on various sides of an issue. Second, although it is a separate branch of government and not simply an agency (in contrast, for example, to the Department of Labor), the court system must still lobby the legislature for its annual operating budget and on other issues that directly affect the judicial system. For example, if the court system needs additional superior court judges in a particular area of the state, it must obtain authorizing legislation. Similarly, salary increases for judges require legislative action, though Article IV, Section 13, of the constitution prohibits the legislature from reducing the salary of sitting judges. Thus, when the judicial branch seeks legislative action, it is itself acting as an interest (a "lobby"), and the court system's administrative director, or his or her representative, sometimes operates in the legislature as a political operative just like any other lobbyist.

Third, while the retention elections that judges must face periodically are rarely controversial, occasionally they do become heated. For example, two chief justices, Jay Rabinowitz in 1988 and Dana Fabe in 2010, received some fairly intense opposition to their reconfirmation, though both secured retention. This opposition shaved ten points or more off of the usual 65 or so percent that judges receive in reconfirmation votes. Fourth, and a related point, there are periodic moves to reform the court system, including the way that judges are selected and retained, and these efforts can also get quite political.

The fifth aspect of the judiciary's role that may have political implications is what can be called judicial administrative activism (related to but not to be confused with *judicial activism,* explained below). Administrative activism is where the court system, particularly the chief justice and administrative director, takes action to make the court system more responsive to Alaska's needs, particularly in rural-bush areas.

The Tension between Independence, Impartiality, and Politics: The Issue of Judicial Activism

When the theory of impartiality meets the reality of the need for courts to interpret the law, tensions inevitably arise. Most judicial interpretations of the law have few political consequences, but others can cause quite a political stir. When courts take an active, often expansive role in interpreting laws and constitutional provisions that have major policy and political consequences, it is often referred to as *judicial activism*. This is a term

with many nuances of meaning and can be used in a positive or pejorative way depending on whether a particular judicial decision is viewed positively or negatively.

In essence, judicial activism is the court taking the initiative in making decisions that might normally be seen as the province of legislation, or interpreting the constitution or a law very broadly. Judicial activism is often characterized by a broad construction of the constitution and laws, and can be contrasted with strict construction. Judicial activism is usually associated with courts with liberal leanings and a liberal philosophy in general. Conservatives courts tend toward strict construction and oppose judicial activism. It is often more complicated than that, however, with these various terms being politically loaded and sometimes employed in the rhetoric of opposing ideologies. But there is no doubt that, since statehood, judicial activism has been one element of the Alaska judiciary's decisions.

The fallout from judicial activism, or sometimes when a court simply decides a case that comes before it in an impartial way, can affect the court system's funding, or may produce a movement for judicial reform or opposition to the retention of certain judges. And even though the Alaska judiciary is organized to mitigate its being embroiled in politics, judicial politics is a constant and unavoidable fact of life in the past, present, and future of politics in Alaska.

2. INFLUENCES THAT SHAPED AND CONTINUE TO AFFECT THE STRUCTURE AND ROLES OF ALASKA'S THIRD BRANCH OF GOVERNMENT

Unlike most states, Alaska has a highly centralized and unified state court system. All courts are funded by the state, and ultimate administrative authority over all courts resides in the Alaska Supreme Court. There is no authority for municipalities to establish or administer local courts. Five interrelated influences were particularly important in shaping Alaska's court system and its judicial branch, and some of them continue to influence this third branch of government. These are: (1) the pre- and post-statehood role of the federal government; (2) Alaska's late admission to the Union; (3) the physical, social, and political geography of Alaska; (4) the influence of Alaska Natives; and (5) a strong commitment to individual rights.

The Pre- and Post-Statehood Role of the Federal Government

The Organic Act of 1884 established the structure for Alaska's territorial government and court system. Judges and commissioners of the territorial court system were appointed to four-year terms by the U.S. president and subject to confirmation by the U.S. Senate. This system was fraught with structural and practical problems. Territorial judges

were subject to political pressure, such as threats of not being reappointed, and, therefore, were less able to counter powerful interest groups emerging in Alaska, such as mining syndicates and fishing interests. Moreover, the vastness and remoteness of the Territory imposed practical problems for judicial administration. The district court judges were spread across four judicial divisions (Juneau, Nome, Valdez/Anchorage, and Fairbanks), and their resources were largely expended on the most serious crimes. Outside these cities, there was little access to justice, and the system was constantly strained. By the early 1950s, however, with the burgeoning Cold War, federal spending skyrocketed in Alaska. The increased population and accompanying social problems highlighted that the judicial system was completely inadequate to handle legal issues in the growing Territory.[1]

Alaska's Late Admission to the Union

Alaska's late admission to the Union had far-reaching effects on its government and politics. This is particularly evident in the court system and its involvement in politics. In particular, the fact that Alaska's founders could draw upon the experiences, both positive and negative, of the other forty-eight states influenced their approach to the organization of the court system. Plus, the dawning and consolidation of the age of atonement toward Native Americans has placed Alaska's state courts in a particular relationship with tribal courts, and the issues regarding Alaska Natives and their political role resulting from Alaska's late admission also affects the court system.

Another factor combines both Alaska's late admission and its newness as a state. When statehood became a reality in 1959, the Alaska courts were faced with a blank slate when it came to many major legal issues. This vacuum of legal authority has allowed Alaska's courts a unique perspective. The Alaska Supreme Court tends to side with the more modern or majority trends unless there is a strong legal or policy reason to do otherwise.

The Physical, Social, and Political Geography of Alaska

Clearly, the physical geography of the state, its sheer size and barriers to transportation, present challenges to the Alaska court system not faced by small states like Vermont and Maryland or even large states that have developed road systems like Texas and Wyoming. These challenges include the cost of providing courts and the most efficient way to organize them in rural-bush areas. Then there are the influences resulting from the social geography of the state and particularly the cultural differences of the Alaska Native population, not only in rural-bush communities but also in urban areas. These factors can influence the court system because of the regional loyalties of politicians, particularly the efforts of rural-bush legislators and others to ensure an equal and culturally sensitive administration of justice in both urban and rural-bush areas.

The Influence of Alaska Natives

Also identified as a characteristic of Alaska politics in Chapter 2 is the influence of Alaska Natives. One of the many facets of this influence has been on the court system. Over the years, this influence includes sensitivity on the part of the court system to providing justice in rural-bush areas and ensuring that the administration of justice is appropriate and sensitive to the effect of sentencing practices on Natives within the criminal justice system. The court system has also been aware of the political influence of rural-bush legislators, many of whom are Alaska Natives, and the effect that they can have on court system budgets and other administrative initiatives.

The influence of the Native community and its issues can be quite complex as they relate to the court system, particularly because of ongoing interactions between tribal courts and the state court system, and jurisdictional disputes between Alaska Native tribes and the state and federal governments on sovereignty issues. These complex interactions often have major political as well as legal consequences. Two particularly thorny issues in this regard have been subsistence and Native sovereignty (for details on these issues, see Chapter 9 on Alaska Natives).

A Strong Commitment to Individual Rights

The protection of individual rights by the Alaska Supreme Court (which has sometimes involved judicial activism) has been a major source of the political controversy surrounding the judiciary. The court is most likely to be at the center of particularly intense political debate resulting from the protection of the individual rights of unpopular groups and politically divisive issues. This can put the court at odds with conservative lawmakers, forcing the state Supreme Court to find creative ways to protect rights while still deferring to reasonable policy goals of the legislature.

Several states have a commitment to the protection of individual rights in their constitutions, including Alaska. However, the Alaska Supreme Court has championed individual rights, such as privacy and religion, as stringently, if not more so, than any state in the nation. For example, nine other states have "privacy" provisions in their constitutions, but only Alaska has a judicial opinion like *Ravin v. State* (1975), holding that personal privacy in the home outweighs the state's interest in prohibiting possession in one's home of small amounts of marijuana intended for personal use.

3. THE ORGANIZATION OF ALASKA'S COURT SYSTEM COMPARED WITH OTHER STATES

State court systems across the United States include a wide variety of structures. Some, like Alaska, have highly unified systems, with the state Supreme Court having

administrative supervision of all other appellate courts and all trial courts. Even within a fairly unified system, there may be several specialized trial courts dealing with specific areas of law, such as criminal or family law. And most systems, regardless of the degree of unification, have at least two levels of trial courts with differing levels of jurisdiction. For instance, virtually all states have "superior courts" (sometimes called "courts of general jurisdiction"), which are allowed to hear any kind of case, including civil cases involving any amount of money and criminal cases involving both serious (felony) and less serious (misdemeanor) crimes. Most states also have lower courts with, for example, criminal jurisdiction limited to traffic violations and misdemeanors and civil jurisdiction limited to cases involving small amounts of money. Figure 17.1, comparing the structure of Alaska's court system with those of New York and Wyoming, highlights these contrasts.

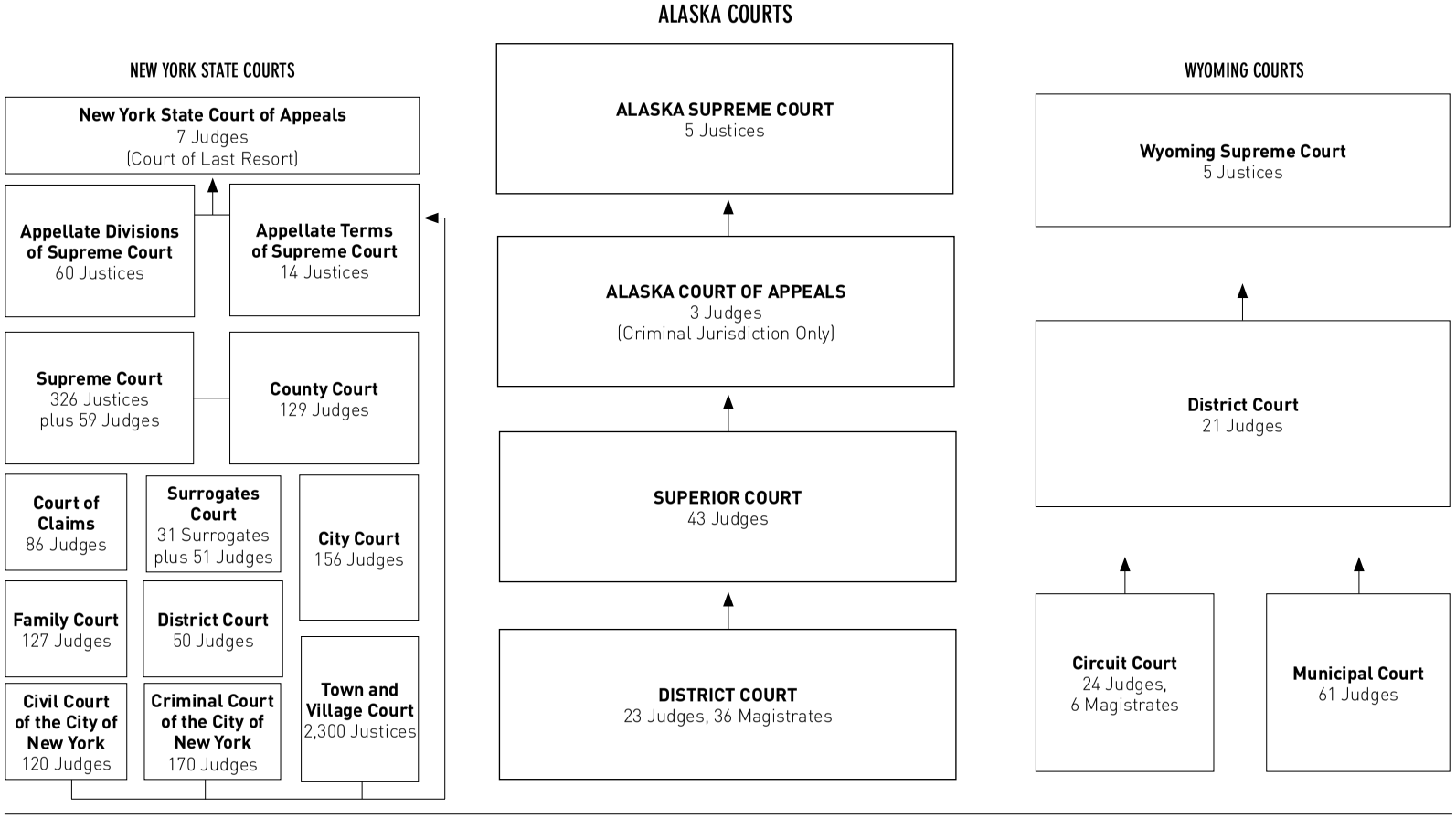
The Alaska Supreme Court has total administrative authority over all levels of courts in the state. There are no city courts to contend with or family courts or traffic courts to complicate the administration of justice. Compare this to the organization of the New York system, an example of a more complex, fragmented court structure with many courts dealing with specific and narrow areas of law (as illustrated in Figure 17.1). Alaska and some other western states reflect the modern trend of a unified court system. Some sparsely populated western states have more streamlined court systems because they do not have the population or volume of litigation necessary to justify special courts to handle only probate, traffic, or family matters. New Jersey is an example of an eastern high-population state with a unified system not unlike Alaska's. It was, in fact, New Jersey's court system that Alaska's founders found very appealing in developing the Alaska court system. Wyoming is another example of a unified court system, as Figure 17.1 shows.

Several western states have added levels of courts as needed while maintaining the overall unified organization of their state court systems (see, for example, information on the Alaska Court of Appeals, below). The reliance on fewer courts of specialized jurisdiction in many western states, including Alaska, means that judges must hear all manner of cases, so the judiciary tends to be composed of highly competent generalists rather than specialists in any one area of law. The structure of its court system is another way in which Alaska is like many of its western neighbors.[2]

Box 17.1 explains the types of courts, their jurisdiction, and judicial officials in Alaska. There are some features not present in most states. First, the superior court can act as both a general trial court as well as an appellate court for the district court. Another variation is Alaska's Court of Appeals, established in 1980, which handles only criminal appeals. This court was created as a matter of judicial economy (that is, the allocation of judicial resources and expertise) and to provide the due process right to an appeal without overloading the Alaska Supreme Court. Parties can still appeal an Alaska Court of Appeals

FIGURE 17.1

The Alaska Court System Compared to New York State and Wyoming as of 2015



Note: New York State uses unique names for some of its courts.

Source: Developed by the author.

BOX 17.1

Alaska's Courts, Judicial Officials, and What They Do

GEOGRAPHICAL ORGANIZATION OF THE COURT SYSTEM

As in Territorial days, Alaska continues to divide the state into four judicial districts. The first judicial district covers Southeast Alaska. The second includes Northwest Alaska and the North Slope. The third covers Southcentral Alaska, the state's major population center, as well as the Bristol Bay region and the Aleutian Chain. And the fourth includes the Interior and Southwest Alaska, including Bethel.

TYPES OF COURTS AND JUDICIAL OFFICIALS

Magistrates

Magistrates are judicial officers of the district court who hear certain district court matters and often work in rural-bush areas where there is no full-time district court judge. They also help with the caseloads in urban areas. Magistrates are appointed by the presiding judges of the four judicial districts. They are not required to be lawyers, nor are they required to stand for retention elections as are all judges. A magistrate's jurisdiction includes small claims cases, solemnizing marriages, domestic violence cases, traffic infractions, arrest warrants, and summonses.

District Courts

The Alaska Constitution provides that the legislature shall establish such lower courts as may be necessary. Accordingly, in 1959, the legislature created a district court for each judicial district. In 2016 the district court had twenty-three judges statewide. District court judges may, for example, hear misdemeanors, first appearances in felony cases, and civil cases valued up to $100,000.

Superior Court

The superior court is the trial court of general jurisdiction. Each of Alaska's four judicial districts has a superior court. In 2016 there were forty-three such judgeships located throughout the state. The superior court has authority to hear all cases, both civil and criminal, properly brought before the state courts, although it does not routinely hear cases that may be brought in the district court. The superior court also hears appeals from the district court and from executive agency administrative adjudications.

Court of Appeals

The court of appeals consists of a chief judge and two associate judges. It has the authority to hear appeals in criminal cases and certain other quasi-criminal cases in which a minor is accused of committing a crime (juvenile delinquency cases), cases in which prisoners are challenging the legality of their confinement (habeas corpus matters), and cases involving probation and parole decisions.

Supreme Court

The Alaska Supreme Court is the highest state court. It hears appeals from lower state courts and also administers the state's judicial system. The court is comprised of the chief justice and four associate justices. All five, by majority vote, select one of their members as chief justice, who holds office for three years. The chief justice may not serve consecutive terms, but can be reelected after sitting out one term. The Court has final state appellate jurisdiction in civil and criminal matters in Alaska. However, certain issues can be appealed to the U.S. Supreme Court—primarily those involving questions of federal statutory or constitutional law.

Source: Developed by the author.

decision to the Alaska Supreme Court, but the Alaska Supreme Court has discretionary authority to hear the case, meaning it can hear the case or decline to do so.

From both an administrative and political point of view, Alaska's unified and centralized court system appears very appropriate for the state's socio-economic and geographical circumstances and has many advantages over a fragmented system. The unified system allows the Alaska Supreme Court, through its administrative director, to organize the system to compensate for the vastness and high costs of administering justice and deal with other—often uniquely Alaskan—judicial issues. This may actually reduce the political involvement in judicial actions as the system anticipates and addresses needs that it can enforce throughout the system. If this were a fragmented system like those found in New York or Arkansas, no such centralized body would exist to develop and administer such statewide legal policy. Moreover, politics are more pervasive in such fragmented systems as various legal jurisdictions vie with one another for state funds.[3]

Alaska Native Tribal Courts and Councils

Alaska's state court system interacts with Alaska Native tribal courts and village councils across the state. Although the U.S. Supreme Court largely squelched Alaska Native sovereignty in the *Venetie* case in 1998, the fact remains that both formal and informal dispute resolution continues to take place outside the Alaska court system.[4] These tribal courts and councils span both rural-bush and urban areas and cover an array of local issues. Some past and present examples of tribal courts in Alaska include the Sitka Tribal Court, Tanana Chiefs Council, Tlingit and Haida Court, Chevak Tribal Court, Minto Tribal Court, and others throughout the state.[5]

A primary area of jurisdiction for tribal courts involves the Indian Child Welfare Act (ICWA) cases and customary adoptions. Congress passed the ICWA in 1978, prompted by the high number of American Indian and Alaska Native children being removed from their homes by both public and private agencies.[6] Tribal courts or village councils may also handle disputes about public drunkenness, disorderly conduct, and minor juvenile offenses. They also help parties settle small property claims. These courts may impose fines, require community work service and alcohol treatment, or stipulate other conditions. Some tribal courts and village councils are somewhat structured, while others are more informal.

Resolution by tribal courts of minor regulatory offenses benefits both the state (by easing its caseload) and the locality (by providing enforcement). More serious crimes and larger civil claims are still heard in the state court system. Tribal courts rely heavily on cooperation not only with the state's judicial branch but also with executive branch agencies. The success of tribal courts in Alaska largely depends on whether the relationship

BOX 17.2

Bush Justice: An Imprecise Term with Several Meanings

The term *bush justice* is often used in Alaska to refer to judicial and law enforcement activities in rural-bush areas, but mainly in remote Alaska Native villages. However, the term is imprecise and can mean different things to different people. Broadly, it has three different meanings, and often there is overlap among them.

THE STATE COURT SYSTEM'S PERSPECTIVE

The court system tends to view bush justice in terms of the challenges of providing access to state courts in a timely and effective manner across the vast geographical area of rural-bush Alaska. It also involves raising the awareness of judges, magistrates, and other court system personnel to the cultural perspective of Alaska Natives. These challenges have partly been addressed through the initiatives referred to in the text as *judicial administrative activism*.

THE PUBLIC SAFETY PERSPECTIVE

Isolated rural-bush areas accessible only by air or water often wait days before the nearest state trooper can respond to infractions of the law, especially in winter. Thus, village public safety officers (VPSOs) or village councils often fill gaps in law enforcement and dispute resolution. Plus, individuals or groups sometimes resort to self-help, informal community dispute resolution, or other means of enforcement of community norms and values.

THE TRIBAL COURT AND VILLAGE COUNCIL PERSPECTIVE

Some view bush justice as referring to the role of tribal courts and village councils in dispute resolution. Particular areas of their jurisdiction are sanctioned by federal law, as explained in the text regarding the role of tribal courts and councils. To some extent, this perspective is intertwined with the issue of Native sovereignty and the right claimed by many Native groups to pass judgment and enforce those judgments based on the legal sovereignty of Alaska tribes.

Source: Developed by the author.

between state and tribal courts is cooperative or competitive. One issue regarding the state-tribal court relationship is that of comity: state courts are not legally bound to follow tribal court decisions but can do so if they wish.

A term often used in the activities of the court system and law enforcement in rural and particularly bush areas is *bush justice*. But, as Box 17.2 points out, this is a very imprecise term.

4. PROVISIONS FOR INDEPENDENCE, IMPARTIALITY, AND ACCOUNTABILITY: JUDICIAL SELECTION AND RETENTION IN ALASKA AND IN OTHER STATES

In the selection and retention of judges, there is a major distinction between state and federal courts. The U.S. Constitution provides lifetime tenure for U.S. Supreme Court Justices, U.S. Court of Appeals judges, and District Court judges "during good behavior," with no retention elections, though their initial appointments must be confirmed by the U.S. Senate. In contrast, the vast majority of state court judges—some 87 percent—are subject to popular election in some form.[7]

Across the fifty states, the methods of judicial selection and retention run the gamut from never facing voters to contested, partisan elections. These differences are partly an outgrowth of the political culture and the history of each state. Southern states, with their Jacksonian tradition of direct voter accountability, tend to favor a judiciary fully accountable to voters through contested elections. Northeastern states, with judicial systems developed at the time of the birth of the nation, favor appointment and even life tenure, in order to insulate judges from the political atmosphere of a contested election. With their populist and progressive traditions, a number of Midwestern and western states, including Alaska, balance elections and appointments by using a method known as the Missouri Plan, or merit selection system.

The Missouri Plan has two key features. First, the governor appoints a candidate from a list drawn up by a nonpartisan council called a judicial council or judicial commission, among other designations. Use of a judicial commission to assist in gubernatorial appointment is part of a modern trend in use in 34 states and the District of Columbia.[8] Second, there are periodic uncontested retention elections after initial appointment, in which voters are asked to vote "yes" or "no" to the question, "Should Judge X be retained?"[9] The Missouri Plan involves a minimal and sometimes no role for the legislature. The plan considerably reduces the intense partisanship, acrimony and high cost that often accompanies contested judicial elections in many states.[10]

Alaska's Judicial Selection Process

As in most western states, the process of judicial selection and retention in Alaska is a prime example of balancing accountability with the need for judicial independence. History and political culture came very much into play when Alaska's founders developed these aspects of Article IV of the constitution. The Territorial history of strong external economic and political forces and an inadequate judicial system favored creation of an independent judiciary insulated as much as possible from politics. At the same time, there is a strong strain of democracy and populism in Alaska that wants to make officials

accountable to voters. Together, these forces help explain the founders' selection of the balanced Missouri Plan.

Alaska's selection of its supreme court justices and other judges is similar to seventeen states in that their appointments are recommended by an independent judicial commission—the Alaska Judicial Council. The governor then appoints the justice or judge from the list forwarded to him or her by the council. The appointee must then stand for retention at the next regular general election. Alaska allows a very limited role for the legislature in determining the composition of its court system. This role includes legislative confirmation of the three members of the Judicial Council who are appointed by the governor, controlling the number of judges in each judicial district, and using the budgetary process to create judicial positions to meet policy goals. However, as explained later, in 2014 there was a move to change the composition of the Judicial Council and the role of the legislature in the confirmation process of members of the council.

Judicial Retention Elections in Alaska

States vary widely in the length of their judicial terms—the years between retention elections. The length of terms in a state is one indication of the state's propensity towards either independence or accountability. Seventeen states, including Alaska, have uncontested retention elections following initial appointment. Of these, seven western states, including Alaska, have uncontested retention elections for general jurisdiction courts.[11]

Alaska bases the frequency of retention elections on the level of court. Supreme Court Justices stand for retention every ten years. Eleven other states have ten-year terms for their highest court, a length surpassed only by six states.[12] Alaska Court of Appeals judges stand every eight years, Superior Court judges every six years, and District Court judges appear on the ballot every four years. Alaska's reluctance to allow contested judicial elections, in theory, shifts the focus from the competing ideologies of candidates to the individual performance of the incumbent. Across the United States, the vast majority of judges who stand for uncontested retention elections are retained. In Alaska, 60 to 70 percent of voters generally choose to retain judges. Only a few have not been retained, usually due to misconduct or performance issues.

Balancing Populism and Judicial Independence: A Look Inside the Alaska Judicial Council and Challenges to Its Nonpartisan Makeup

The key mechanism by which the courts have achieved a balance between populism and independence is through the evaluation and selection criteria employed by the nonpartisan Alaska Judicial Council. The framers saw this body as so crucial to the vitality of the courts that they enshrined it in the state constitution.

Composition of the Judicial Council

The Alaska Constitution Article IV, Section 8, provides that the Judicial Council shall have seven members. Three are lawyers appointed by the Alaska Bar Association and three are non-lawyers appointed by the governor and confirmed by the legislature. The Chief Justice of the Supreme Court is the council's seventh ex officio member and chairperson. The six appointed members sit for staggered six-year terms, are spread geographically throughout the state, and are appointed without regard to political affiliation.

Arguably, the legal profession has the most influence in this nomination process with three lawyers and the Chief Justice, who by law is required to have been a practicing lawyer prior to appointment to the court. However, this influence may not be entirely a bad thing. One of the fundamental concepts underlying the Missouri Plan is that judges should be selected on the basis of merit—that is, the ability to be a good judge—rather than political influence. Law-trained members have more familiarity than laypersons with the subject matter and the candidates. At the same time, it is important to have the balanced views that the three lay members bring to the selection process. Maintaining balance on the council is critical because of its gate-keeping function: the governor may only choose judges from the list forwarded to him or her by the council. While in theory this system should avoid politics entering into the judicial selection process, in practice it has not been without controversy, and there is the potential for partisan politics to become involved.

Avoiding Deadlock: The Council Averts a Potentially Stymied Process

Some past governors have asked the council to provide additional names from which to make a judicial appointment. In August of 2004, however, Governor Murkowski formally rejected the list provided to him by the council. The rejection sparked numerous editorials across the state, mostly in favor of an independent judiciary. Further conflict was averted a month later when the governor made an appointment from the original list. The event is noteworthy as it represents potential for a stymied process. The governor and the Judicial Council could conceivably deadlock in a protracted clash, with the governor refusing to appoint from the list provided, and the Judicial Council refusing to name additional candidates. It is unlikely that the council will ever provide the governor with additional candidates in such a situation.[13] Continued deadlock would probably lead to litigation, and the litigation would be decided in the judicial branch, which would follow the constitution and thus find in favor of the council. Thus there is little incentive for the governor to pursue or sustain this kind of deadlock.

Ensuring Independence and Quality: The Council's Evaluation of Judicial Candidates

The Alaska Judicial Council also makes recommendations regarding the fitness of judges facing retention elections. It scores judges numerically on a range of criteria, and,

in rare cases, will recommend to the electorate that a judge not be retained. Some of the criteria the council uses to evaluate existing judges include surveys by attorneys, peace officers, social workers, jurors and court employees; attorney questionnaires; and other records.

A summary of the council's evaluations and recommendations are included in the Official Election Pamphlet published by the Division of Elections in the lieutenant governor's office. The pamphlet contains important information about a judicial candidate's fitness for office. This is particularly valuable because there is a paucity of information available to voters regarding judicial retention elections. This evaluation and recommendation role is another way in which the council plays a prominent role in the merit system in Alaska.

Moves to Reform the Composition of the Judicial Council

Not all Alaskans, however, are happy with the work of the council and particularly the types of candidates it nominates for appointment. Many Alaska conservatives and strongly religious people believe the records of those nominees recommended to the governor and appointed to the bench are too activist and are unhappy with court decisions on abortion and other social issues. They see attorneys as having too much say in the selection of judges. These opponents of the present process have the support of several conservative Republicans in the legislature, including Senator Pete Kelly of Fairbanks. In the 2014 legislative session, Kelly introduced Senate Joint Resolution 21 (SJR 21). The final version of SJR 21 would have increased the number of Judicial Council members to ten by adding three more lay members and also require the legislature to confirm the lawyer appointees, which, as indicated earlier, is not presently the case. The change would require a constitutional amendment first approved by two-thirds of each house of the legislature (fourteen votes in the Senate and twenty-seven in the House) and then approved by the voters.

Jim Miller of Alaska Family Action (a conservative family values organization) said in a blog post supporting the amendment that it, "would fundamentally transform the council from a panel dominated by legal elites into a panel dominated by non-attorney citizens." Opponents of the measure, primarily moderate Republicans and Democrats, argue that it would politicize the appointment of judges.[14] Before their election as governor and lieutenant governor, respectively, in November 2014, both Bill Walker (an attorney by profession) and Byron Mallott, a prominent Alaska Native leader, strongly opposed the amendment. Mallott commented that the amendment would "reshape the judiciary into an ideological rubber stamp of government actions. This is because the governor would choose the six lay members, and the legislature would confirm or reject the attorney members, and political partisanship would inevitably come into play."[15] Although

the governor has no role in the constitutional amendment process, Governor Walker's position may help the opponents and supplement the position of the bulk of the state's legal profession who also oppose the amendment. A group of attorneys and concerned citizens, including former Supreme Court Chief Justice Walter "Bud" Carpeneti, have formed Justice Not Politics Alaska, a nonprofit lobby group to fight the amendment.[16]

Even though SJR 21 never came to the Senate floor for a vote in the 2014 session, the issue has probably not gone away. The years to come may see further conflict over this issue.

The Alaska Commission on Judicial Conduct

In all fifty states and at the federal level, judges must follow strict rules of ethical conduct. As the vetting process is so stringent in states like Alaska, judicial misconduct is not widespread. However, every state has an organization to investigate allegations of judicial misconduct. In Alaska this body is the Commission on Judicial Conduct, a body established in Article IV, Section 10, of the Alaska Constitution.

Composed of three judges, three lawyers, and three public members, the commission investigates complaints alleging misconduct by a particular judge. Most complaints are filed by litigants, though some are filed by lawyers who have observed conduct that allegedly violates the ethical rules of conduct for judges. The most typical complaints against judges allege improper courtroom behavior and bias, though any judicial behavior that constitutes a violation of ethical rules may form the basis of a complaint. The commission investigates all complaints that are within its jurisdiction. Its proceedings are kept confidential, although it periodically issues nonconfidential advisory opinions about what a judge may or may not do in a hypothetical situation.

Some complaints, such as those in which a litigant simply disagrees with a legal ruling by the judge, are dismissed immediately without investigation, as the commission does not consider complaints of that nature as being within its jurisdiction. If the commission finds probable cause to believe that a violation of the ethical rules has taken place, it may proceed to a formal hearing. If, after the hearing, the commission finds that a judge has violated the ethical rules, it does not itself impose discipline on the judge. Instead, it makes a recommendation to the Alaska Supreme Court for particular disciplinary action. The Supreme Court has ultimate authority to take disciplinary action, ranging from private or public censure, to suspension, and even to removal from office.

5. THE JUDICIARY AND ALASKA POLITICS AND PUBLIC POLICY

In this section we go into more detail on six aspects of the Alaska court system's political role: (1) the issue of judicial activism; (2) a corollary issue of privacy and individual

rights; (3) rural-bush versus urban court facilities and Alaska Native issues; (4) the court system as a lobby; (5) the court system as a target of "lobbying"; and (6) the politics of court reform. In many ways, these six are interrelated. The interrelationship stems from the court system's effect on Alaska politics and public policy and reactions to that influence by the other two branches, by the public, and sometimes by the media.

Opposing Viewpoints: Judicial Independence or Judicial Activism?

The Alaska Supreme Court has engaged in judicial activism in varying degrees since statehood. There are very different perceptions about the validity of this role of the judicial branch among Alaskans.

This was especially apparent when the Alaska legislature and the courts clashed in the late 1990s in cases such as *Bess v. Ulmer* (1999).[17] The case dealt with three highly charged ballot initiatives proposing changes to the Alaska Constitution (restricting marriage to the union of a man and woman, limiting prisoners' constitutional rights, and legislative reapportionment). The Alaska Supreme Court struck down the prisoners' rights initiative and struck a sentence out of the wording of another initiative. Altering the ballot initiative was seen by some as an affront to the democratic process and set the stage for a battle between the will of the people as reflected in the ballot initiatives and the force of law as interpreted by the Supreme Court.

Conservative legislators like Senators Dave Donley, Robin Taylor, and Loren Leman countered with proposed constitutional amendments calling for more frequent retention elections and even judicial appointment directly by the governor without nominations by the Judicial Council.[18] These proposals failed. But, as with the issue of the composition of the Judicial Council considered earlier, competing ideologies about the proper role of the courts in relation to public policy have been a constant in Alaska politics since soon after statehood, and it is likely to continue.

Individual Rights

The expansion of individual rights by the Alaska Supreme Court has also resulted in a clash of ideologies over the proper role of the courts. Chapter 4, on the constitution and its interpretation, pays considerable attention to the hallmark role of the courts, and particularly the Alaska Supreme Court, in defining Alaskans' personal rights, and explains key court decisions.

Other examples of the court's decisions on personal rights include *Mickens v. City of Kodiak* (1982), in which the Alaska Supreme Court held that nude dancing in a bar is a form of free expression protected by freedom of speech, and *Frank v. State* (1979), linking the taking of moose out of season for a funeral potlatch to religious freedom.[19] Then, in

the ruling in *Alaska Civil Liberties Union v. State of Alaska* (2005), the Court ruled that the constitution requires the state to provide the same benefits to public employees in a same-sex relationship that it provides to public employees in traditional marriages.[20]

Rural-Bush versus Urban Court Facilities and Alaska Native Issues

The significance of Alaska Native issues remains high among the concerns of the court system, even after the *Venetie* decision. This is for both administrative and political reasons.

Administratively, the Alaska court system has always been cognizant of providing judicial services in rural-bush Alaska that both enhance access and are culturally sensitive. The court system has noted disparities in the access to courts among rural-bush and urban residents. A 1997 report from a Supreme Court advisory committee stated:

> Urban residents have far more access to justice system services than village residents. One-fourth of Alaskans do not live within reasonable reach of many court system services. Rural residents do not receive adequate legal representation in either civil or criminal matters.[21]

The report also catalogued many language and culture problems and provided recommendations to help bridge the urban versus rural-bush divide, as well as the estimated costs to do so. Part of the divide is historical, as the state uses four judicial districts that are a vestige of the Territorial era, so the system is naturally biased toward the population centers of the state. The court system has worked to address these problems through judicial administrative activism. Among other provisions, the court system has ensured that most areas with a significant population have at least some access to a magistrate, that there is cultural sensitivity training for judges and court employees, and, where appropriate, that tribal and village council dispute resolution mechanisms are utilized.

Over the years, these and other provisions by the court system have made many political points with rural-bush and particularly Native legislators. This has been of crucial importance because many Native legislators, such as John Sackett, Frank Fergusson, Al Adams, Lyman Hoffman, and Albert Kookesh, have been in key positions of power and able to influence the court system's budget as well as other issues affecting the courts. The importance of such political points will become clearer in considering the role of the judiciary as a lobby.

Alaska's Court System as a Lobby: Promoting and Protecting Its Interests

Although judges are largely insulated from day-to-day politics, the Alaska court system is a large bureaucracy and has the same needs as any bureaucracy. It needs new buildings, technology, support staff, funds to implement new programs, salary increases,

BOX 17.3

The Administrative Director of the Alaska Court System: A Link to the Executive and Legislative Branches

Section 16 of Article VI of the Alaska Constitution states in part:

> The chief justice of the court system shall be the administrative head of the courts. . . . The chief justice shall, with the approval of the supreme court, appoint an administrative director to serve at the pleasure of the supreme court and to supervise the administrative operations of the judicial system.

The administrative director, then, is a constitutionally mandated official of the judiciary. That person is primarily responsible for the efficient day-to-day administration of the court system and works closely with judges, especially the Supreme Court and particularly the Chief Justice, to develop the goals and priorities of the judiciary.

While individual administrative directors may vary in their approaches, one of their essential roles in implementing court system goals and priorities is a political role—to act as a link to the legislative and executive branches of government. This involves lobbying and developing relationships and reaching agreements with legislators and executive department officials. Part of this role may involve the director acting as a buffer to shield the judiciary from conflicts of interest or the appearance of impropriety.

Since the court system established its budgetary and administrative independence from the executive branch in the mid-1970s, the administrative director, either directly or through a member of the administrative office staff, has been of crucial importance in dealing with public policies that impact the court system. The legislature, in particular, is where the court system must focus its efforts related to budgetary goals and statutory changes.

Different administrative directors may choose to be less politically active personally and may delegate direct contact with the legislature to other administrative office staff. But even though the political styles of administrative directors may differ over time, the court system's role as a lobby is a continual one.

Source: Developed by the author and largely based on a phone interview of February 10, 2010, with Arthur Snowden, former administrative director of the Alaska Court System, 1973–1997.

retirement benefits, and so on. Consequently, even though it is a separate branch of government, the court system, like state agencies, needs to advocate for itself in the budgetary process and weigh in on policy proposals that impact the administration of justice. Responsibility for these duties rests largely with the administrative director of the court system. Box 17.3 explains the director's role.

Until the mid-1970s, Alaska's courts relied on the executive branch to deal with many administrative matters (personnel, facilities, and so on). Therefore, while constitutionally

an independent branch of government, the court system's administrative functions were not independent. One major example was the governor's insistence on having a say in the court system's annual budget request before it went to the legislature. This changed with the hiring of a new administrative director, Arthur Snowden, in 1973. Snowden, who served until 1997, worked with the Supreme Court to establish the judiciary as a truly independent branch of government and created an efficient court system administratively. The system also established itself as a credible and effective political force in its relations with the other two branches of government. As a result, the court system secured many benefits for its employees, including a new courthouse for Anchorage, funds for the administration of rural-bush facilities and services, and increased pay and benefits for judges.

The Court System as a Target of Lobbying

There is another aspect of lobbying that often places the court system, particularly the Supreme Court, in the thick of state politics. This is when the courts are the target of lobbying—not in the sense that the courts are being lobbied as courts, but rather the use of the courts by interest groups and other bodies, including the state, to obtain rulings in their favor on an issue directly affecting public policy and in some cases actually making policy. The use of the courts by various interests is on the increase and is often used when the legislature or executive branch will not act on an issue or has not produced a result satisfactory to the interest concerned. Some of these cases involve judicial activism, with the court making a broad policy ruling beyond what the facts of the case might require. In other cases, the courts are passive, and go no further than to resolve disputed facts and legal arguments.

Whether passive or activist, the decisions of courts can have far-reaching policy effects and sometime controversial ones. Three of the most prominent Alaska decisions with significant policy implications include the *Molly Hootch* decision in the mid-1970s—with the *Molly Hootch* Consent Decree of 1976—resulting in the establishment of high schools in rural-bush communities.[22] The mental health trust land issue in the 1980s and 1990s was resolved in part by the Alaska Supreme Court's ruling that the state had failed to live up to its trust obligations to set aside state lands to fund mental health programs.[23] And the *Cleary* case, concluded in 2001, dealt with prisoners' rights regarding overcrowded prisons.[24]

Political Issues Regarding Reform of the Judiciary

Even though there are calls from time to time for reforming the judiciary, especially those precipitated by the ideological debate between the activist and strict construction perspectives, none so far has succeeded. The ultimate outcome of calls by Senator Pete

Kelly and others to revamp the Judicial Council is uncertain, as there will likely be future efforts to reform the council. However, there are several factors that make major reform of the Alaska judiciary in the foreseeable future less likely.

First, in many ways, judicial reform in Alaska took place at the Constitutional Convention in Fairbanks in 1955–1956. The founders' efforts to promote judicial independence, impartiality, and public accountability, to minimize judicial involvement in politics, and to ensure efficiency through a unified court system administration, seem to have sat well with the Alaska public and most policy makers. Consequently, there has been no surge of support for judicial reform. In fact, the situation is quite the reverse, as evidenced by the public outcry, described above, at Governor Murkowski's attempts to inject politics into the judicial selection process in 2004. This included close to two hundred editorials appearing throughout the state defending an independent judiciary.

Furthermore, while the legislature and executive have been touched by several cases of corruption, including prison sentences for public officials, the Alaska judiciary has never been affected in this way. Nationwide, the state's judiciary has a reputation for efficiency and integrity. As a candidate, Governor Walker commented that, "Alaska enjoys the reputation as having the finest state judiciary in the nation."[25]

6. CONCLUSION: INDEPENDENCE, PUBLIC ACCOUNTABILITY, AND POLITICAL INFLUENCE

The theme of this chapter was posed in the form of a question: How does the Alaska political and governmental process deal with the tension between the need for independence, a degree of public accountability, and the court system's role in politics and public policy making?

In an imperfect world, there is certainly no ideal solution to this tension. Yet, Alaska's court system meets this challenge as well as any state judiciary in the United States. Alaska does so by combining centralized judicial administration with merit selection and uncontested retention confirmation of judges, thereby insulating the judiciary from politics as far as possible. And given the inevitability of the court system's involvement in politics, both through court decisions and the bureaucratic needs of the system regarding its budget, among other issues, it appears that this political role has been kept within acceptable bounds. Those opposed to judicial activism would, of course, argue otherwise. However, given the fact that, as of 2016, there have been no successful movements to reform the judiciary since statehood, the balance between independence, accountability, and politics appears to have been advantageous to the development of Alaska as a democratic polity.

ENDNOTES

[1] This overview of the early court system draws on Clause-M Naske, *A History of the Alaska Federal District Court System, 1884–1959, and the Creation of the State Court System* (Prepared Pursuant to RSA 410059 between the Alaska Court System and the Geophysical Institute, University of Alaska Fairbanks, 1985).

[2] For a comparative perspective of the western states see John H. Culver, "Judicial Systems and Public Policy," in *Politics and Public Policy in the Contemporary American West*, ed. Clive S. Thomas (Albuquerque: University of New Mexico Press, 1991). For a fifty-state comparison, see Melinda Gann Hall, "State Courts: Politics and the Judicial Process," in *Politics in the American States: A Comparative Analysis*, eds. Virginia Gray, Russell L. Hanson, and Thad Kousser, 10th ed. (Washington, D.C.: CQ Press, 2013).

[3] Interview with Susan Burke, a former Deputy Administrative Director of the Alaska Court System, February 17, 2014.

[4] In the so-called *Venetie* case, *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), the U.S. Supreme Court held that "Indian Country" refers to a limited category of Indian lands (primarily reservation lands) and does not include any of the lands transferred to Alaska Native corporations under the Alaska Native Claims Settlement Act (ANCSA) of 1971. The only designated reservation land in Alaska is Metlakatla in Southeast Alaska. For commentary on the case, see Fae L. Korsmo, "Native Sovereignty: An Insoluble Problem?" in *Public Policy Issues in Alaska: Background and Perspectives*, ed. Clive S. Thomas (Juneau: Denali Press, 1999).

[5] See *A Directory of Disputes Resolution in Alaska Outside Federal and State Courts* (Anchorage, AK: Alaska Judicial Council, March 1999), which lists dozens of tribal courts and village councils.

[6] The stated intent of Congress under the ICWA (25 U.S.C. § 1902) is to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." Among other things, the Act adopted minimum standards for the removal of Indian children from their families, allowed the child's tribe and family to intervene in cases that might result in removal of the child, and required placement of the child in circumstances that would allow for continued exposure to Indian and Native cultural values.

[7] Judith L. Maute, "Selecting Justices in State Courts: The Ballot Box or the Backroom," *South Texas Law Review* 41 (2000): 1197–1245.

[8] Ten of these states, however, use the judicial commission only for midterm vacancies. So the nation is roughly split in half on the use of commissions on the one hand and other forms of initial appointments on the other.

[9] Proposed in 1914 by Albert Kales, then research director at the American Judicature Society, this method of selection and retention became known as the Missouri Plan when that state adopted the plan in 1940.

[10] For perspectives on the increasing intensity of political and partisan conflict in contested judicial retention elections, see Clive S. Thomas, Michael L. Boyer, and Ronald J. Hrebenar, "Interest Groups and State Court Elections, 1980–2000: A New Era and Its Challenges," *Judicature: The Journal of the American Judicature Society* 87, no. 3 (November/December, 2003): 135–44, and 149; and Deborah Goldberg, Craig Holman, and Samantha Sanchez, *The New Politics of Judicial Elections* (New York: Brennan Center for Justice, New York University and the National Institute on Money in State Politics, 2002).

[11] Besides Alaska, the other western states are Arizona, California, Colorado, New Mexico, Utah, and Wyoming. The ten non-western states are Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, Oklahoma, South Dakota, and Tennessee.

[12] New York has a fourteen-year term and five states have twelve-year terms—California, Delaware, Missouri, Virginia, and West Virginia.

[13] The Judicial Council By-Laws (Article 7, Section 5) state that the Council "will not reconsider the names submitted to the governor after the nominees are submitted unless the disability or death of one or more nominees leaves the governor with less than two names for filling a judicial vacancy."

[14] Richard Mauer, "Amendment of Picking Judges Still Up in Air," *ADN.com*, April 7, 2014.

[15] *Alaska Dispatch News*, "Bill Walker Answers Question about the Issues in the 2014 Election for Alaska Governor," October 11, 2014; and Mauer, "Amendment of Picking Judges Still Up in Air."

[16] Interview by Clive Thomas with Walter "Bud" Carpeneti, November, 12, 2014. See the Justice Not Politics Alaska website at http://www.justicenotpoliticsalaska.org/about.html.

[17] *Bess v. Ulmer*, 985 P2d 979 (Alaska 1999).

[18] Senate Joint Resolution 15 (SJR 15), 1999; and SJR 22, 2001.

[19] *Mickens v. City of Kodiak*, 640 P.2d 818 (Alaska 1982): and *Frank v. State*, 604 P. 2d 1068 (Alaska 1979).

[20] *ACLU v. State*, 122 P.3d 781 (Alaska 2005).

[21] "Report of the Alaska Supreme Court Advisory Committee on Fairness and Access," October 31, 1997.

[22] *Hootch v. State-Operated School System*, 536 P. 2d 793 807 (Alaska 1975).

[23] *State of Alaska v. Weiss*, 706 P.2d 681 (Alaska 1985); *Weiss v. State of Alaska*, 939 P 2d. 380 (Alaska 1997).

[24] *Smith v. Cleary*, 24 P. 3d 1245 (Alaska 2001).

[25] *Alaska Dispatch News*, "Bill Walker Answers Questions."