ALASKA'S MERIT SELECTION OF JUDGES: THE COUNCIL'S ROLE, PAST AND PRESENT

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ABSTRACT

Delegates to Alaska's Constitutional Convention adopted a Judiciary Article that called for the state's judges to be selected and retained in a merit selection system. Modeled after the "Missouri Plan," attorneys applying for judgeships are reviewed by the Judicial Council; two or more candidates are nominated to the governor; the governor appoints from the Council's list; and all judges periodically stand for retention in the general elections. Alaska's Judicial Council is composed of three non-attorneys appointed by the governor and confirmed by the legislature, three attorneys appointed by the Alaska Bar Board of Governors, and the Chief Justice who serves ex officio. All appointed members serve staggered six-year terms and are appointed with due consideration for area representation and without regard to political affiliation. This article draws on Council minutes, reports, and other materials to describe the Council's selection process, and how it has evolved since the first days of statehood. The authors evaluate the effectiveness of the process using objective measures, including outcomes of retention elections. Finally, the article concludes with considerations for possible changes to make the process better suited to the Council's increasing work load and the needs of applicants and others participating in judicial selection.

"Since statehood, the Council has continually reviewed its procedures for judicial nomination in order to assure the highest quality of justice for citizens of the state."

-Tenth Report of the Alaska Judicial Council to the Supreme Court and Legislature, 1978–1980

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I. INTRODUCTION

The Alaska Judicial Council is a citizen's council that was created by the Alaska Constitution as part of its merit selection plan. The Council is comprised of three non-attorney members, three attorney members, and the Chief Justice of the Alaska Supreme Court, who sits *ex officio* and serves as chair. The Council is responsible for identifying qualified applicants for judicial positions, and forwarding at least two names to the governor for each vacancy. The governor appoints the judge from the Council's list of nominees.[1]

In crafting this plan, Alaska's Constitutional Convention delegates sought to create a fair judiciary by adopting a proven judicial selection system based on a judge's ability, experience, and integrity, rather than political connection. Most important to the delegates was a tried and workable system. To that end, they chose a merit selection process that had been in use, at least partly, in Missouri and New Jersey. Even at the Constitutional Convention, the delegates were focused not just on the principles of the system, but on how it would form and support a fair justice system.

Although the delegates discussed some of what they envisioned for the judicial selection process at the convention, they left it to Council members to decide how to proceed.[2] This flexibility encouraged the Council to adopt its own procedures and to adapt them over the last sixty years.

The Council's procedures are no mystery. Every time the Council has reviewed and improved its procedures, it has been transparent about any changes. It has reported each major change in its annual reports, minutes, and a published manual of selection procedures. It has been clear throughout its history that the Council members would use the procedures to nominate the most qualified applicants, based on the best information available.

This article examines Alaska's merit selection system by reviewing the nuts and bolts of its selection procedures as outlined in Council records. We first consider the key procedures: the "most qualified" standard, recruitment, the application, the judicial qualification poll, the applicant interviews, public input, Council voting, and transmittal to the governor. We then trace both the origins and the development of those procedures, review current practices, and contemplate some possible

1. ALASKA CONST. art. 4, §§ 5, 8.
2. ALASKA CONST. art. 4, § 8 ("The judicial council shall act . . . according to rules which it adopts.").

improvements to them. Lastly, we discuss evidence that the procedures have worked to identify the best possible judges for Alaskans.

II. THE JUDICIAL COUNCIL'S SELECTION PROCEDURES: PAST AND PRESENT

A. The Constitution

The delegates to the Alaska Constitution met in December 1955 and January 1956 to draft a constitution.[3] A necessary element was an article outlining the Judiciary. When considering Article IV, Section 8, regarding the Judicial Council, the delegates in support of the proposed merit selection system envisioned a process focused on a candidate's qualifications that would serve as a "screening process."[4] The delegates considered elaborating on judicial qualifications in the Constitution, but rejected more specific qualifications in favor of the Judicial Council screening process.[5] After the Constitution was adopted and statehood achieved, members of the first Judicial Council were charged with implementing this screening process.[6]

B. Initial Procedures: The Council's First Year of Work, 1959

In 1959, one of the new state's first tasks was to fulfill the requirements of Article IV. After the Alaska Bar Association and governor made their initial appointments to the Judicial Council, the Council convened in Juneau on May 18–19, 1959.[7] After attending to administrative duties relating to the establishment of the court system, the Council moved on to discuss the judicial nomination process.[8]

The Council agreed that candidates would be nominated for the Council's consideration with the signatures of four laymen, four attorneys, or two attorneys and two laymen, using a petition form designed by the Council.[9] Once the Council received petitions, it would decide which applicants were "qualified," and send those qualified applicants letters asking for "detailed letters including their personal history and background."[10] The Council would then send an advisory

3. *See* Alaska Constitutional Convention (1955) [hereinafter ACC].
4. ACC at 594.
5. ACC at 615–25 (debating whether to specify judicial qualifications in the Constitution, or to leave it to the Judicial Council).
6. Alaska Jud. Council, *Minutes*, 1 (May 19, 1959).
7. *See generally* Alaska Jud. Council, *Minutes* (May 18–19, 1959).
8. Alaska Jud. Council, *Minutes*, 1 (May 19, 1959).
9. *Id.*
10. *Id.* at 2.

poll to all active members of the Bar with the names of qualified applicants.[11] The Council would then investigate each candidate.[12] The Council would meet and nominate candidates to the governor for appointment, considering the results of the Bar survey and all other materials.[13]

The first test of these policies came about a month later, when the Council met again in Juneau to make its nominations for the supreme court and superior court.[14] Twelve people applied for the three supreme court positions[15] and fourteen people applied for the eight superior court positions.[16] Because the Alaska Constitution requires at least two names to be nominated for a judicial position[17] and it had not received enough applicants for the superior court positions, the Council extended the nomination deadline for those positions.[18] At that meeting, the Council also created a survey questionnaire for the Bar's advisory vote on the supreme court candidates.[19]

When the Council met on July 16–17, 1959, in Fairbanks, it added four names to the superior court list for the bar survey[20] and tabulated the results of the supreme court bar survey.[21] The Council nominated six applicants to the governor for the three supreme court positions.[22] At the final meeting of the year, in Seward on October 12–13, 1959, the Council tabulated the bar survey results for the superior court positions and discussed the results of the poll and the applicants until late in the night.[23]

11. *Id.*
12. *Id.*
13. *Id.*
14. One superior court position each in Juneau, Ketchikan, and Nome, three in Anchorage, and two in Fairbanks. FIRST ANN. REP. OF THE ALASKA CT. SYS. 1960, 42 ("The state is not burdened with many metropolitan communities which require a multitude of courts of varying jurisdictions.").
15. The Alaska Constitution established a supreme court with three justices. ALASKA CONST. art. IV, § 2. The legislature added two more justices in 1967 at the request of the supreme court, for a total of five. 1967 SLA Ch. 83, § 1.
16. Alaska Jud. Council, *Minutes*, 1–2 (June 29–30, 1959). The Council had fourteen applicants for eight superior court positions. In order to have at least two names to submit to the governor for each position, the Council would have needed sixteen names.
17. ALASKA CONST. art. 4, § 5.
18. The deadline was extended to July 13, 1959. Alaska Jud. Council, *Minutes*, 3 (June 29–30, 1959).
19. *Id.*
20. The Council had already added Harry Arend's name at the June meeting, but it reaffirmed it at the beginning of the July meeting. Alaska Jud. Council, *Minutes*, 1 (July 16–17, 1959).
21. *Id.*
22. *Id.* at 1–2.
23. Alaska Jud. Council, *Minutes*, 1 (Oct. 12–13, 1959).

The delegates re-convened the next morning, made their superior court nominations, and went home with their first year's work accomplished.[24]

Through this first round of judicial nominations, the Council set out the basic elements of its process. Candidates applied for judicial positions by means of the petition, and the Council asked the applicants for their personal history and background and investigated each applicant.[25] The Council asked Bar members for advisory comments and ratings. It met to review the materials and make its nominations.[26] Throughout this process, the Council sought all available information that would help them identify candidates with ability, experience, and integrity.[27]

As we will discuss in the next section, these basic procedures have changed somewhat in style in the ensuing sixty years, but not in purpose: to identify the best applicants to nominate to the governor. To further that purpose, the Council added additional procedures to gather more and better information. For example, it added interviews of all applicants, an important element of the Council's current process.[28] The Council now also asks for writing samples, performs background checks, requests references, and asks for evaluations from attorneys and judges with recent experience with the applicants.[29] Importantly, it conducts a public hearing to receive public comments on applicants,[30] and solicits additional information from the public during its investigations. These additions have formed a more complete picture of applicants.

From its constitutional convention genesis and throughout its history, the Council process has given priority to the perspectives and questions of all Alaskan citizens. Convention delegates wanted the process to reflect the opinions and values of Alaskans. Just as the delegates wanted to provide representation in the Judicial Council membership for both Alaskan citizens and the legal profession, the selection process itself seeks to engage all citizens. Holding public hearings and encouraging commentary from all Alaskans has helped make that goal a reality.

We can now report on how the first selection procedures transpired because the Council carefully documented them. The Council has consistently reported on and formalized its procedures so that the citizens

24. *Id.*
25. Alaska Jud. Council, *Minutes*, 1–2 (May 19, 1959).
26. *Id.*
27. *Id.*
28. 2015–2016 ALASKA JUD. COUNCIL TWENTY-EIGHTH REP. D-8 to D-10.
29. *Id.* at D-4.
30. The Council has held frequent public hearings throughout its history, often to hear from the public about its research programs and the justice system needs of the communities in which it held the hearings.

of Alaska can understand how the Council operates and examine its processes.[31] Beginning with its first meeting, and in its first report to the supreme court and legislature in 1960, the Council has recorded how it operates.[32] It has continued to document its procedures, and over the years has increased public participation by making the selection procedures available in published reports and on its website.[33]

C. Development of the "Most Qualified" Standard

The Alaska Constitution requires the governor to fill judicial vacancies by appointing "one of two or more persons nominated by the judicial council."[34] The delegates to the Constitutional Convention proposed that the Judicial Council nominate at least two, so that the governor could have a choice.[35] The delegates considered that this would potentially evolve over time resulting in more than two nominees.[36]

The delegates also stated that they wanted judges of ability, experience, and integrity.[37] One member analogized this, in the natural resource-focused terminology of the day, as choosing the "best available timber."[38] Prior to statehood, many of the delegates had suffered from the effects of politically-appointed Territorial judges, who varied greatly in quality and attention to the law.[39] They pushed for consistently high quality judges.[40] This quality-driven philosophy persists throughout the Council's history.

31. Each report to the legislature and supreme court contains a section on council selection procedures. *See, e.g.*, 2015–2016 ALASKA JUD. COUNCIL TWENTY-EIGHTH REP. 6–7.

32. 1960 ALASKA COURT SYSTEM FIRST REP. 49; Alaska Jud. Council, *Minutes* (May 18–19, 1959).

33. *See, e.g.*, the Council's biennial reports, at http://www.ajc.state.ak.us /judicial-council-publications#biennial, (accessed Oct. 19, 2018), and the Council's detailed procedures described in the biennial reports, and online at http://www.ajc.state.ak.us/selection/procedures/ procedures (accessed Oct. 19, 2018).

34. ALASKA CONST. art. IV, § 5.

35. ACC at 606, 684. The number of nominees was set at two due to the size of the Territory. *Id.* at 585, 684 (McLaughlin). But at least one delegate contemplated that three could be nominated "if we have that many [attorneys] to spare and [they] are available to be nominated." *Id.* at 594 (R. Rivers).

36. *Id.* at 683–84.

37. *Id.* at 601–02 (Barr).

38. *Id.* at 594.

39. For a fascinating and entertaining look at Territorial judges and justice, and justice's evolution prior to and just after statehood, *see generally* PAMELA CRAVEZ, THE BIGGEST DAMNED HAT: TALES FROM ALASKA'S TERRITORIAL LAWYERS AND JUDGES (2017).

40. ACC at 694 (McLaughlin).

At its first meeting, the Council established a procedure to determine which of the "qualified" applicants would be nominated.[41] From the very beginning, the Council screened out unqualified applicants, investigated all those qualified, and nominated only the best. Although there was no stated bylaw or published policy at that time for choosing the "most qualified," the procedures themselves brought about that result. These basic procedures remained unchanged from 1959 until 1972.[42]

During this time, the Council focused on attracting the best possible attorneys to the judiciary. In the first decade after statehood, the Council had problems attracting qualified and experienced applicants due, at least in part, to the low salaries of judges.[43] The Council recommended higher judicial salaries[44] and better retirement plans[45] to attract applicants with "the highest professional competence."[46] Eventually, the legislature raised judicial salaries, at least partially,[47] and improved judicial retirement plans.[48]

In 1973, the Council embarked upon an extensive effort to improve its procedures.[49] In its 1973–1975 report, the Council remarked,

> The Alaska Judicial Council is fully aware that the quality of justice in the State of Alaska can be little better than the quality of the men who comprise the judiciary itself. For this reason the Council has embarked upon an extensive effort further to revise and improve its procedures with a view toward the nomination of only the best qualified candidates.[50]

To this end, it outlined the updated procedures, including: requests for writing samples and samples of court cases for review and investigation, a new application form including background qualifications, an updated personal interview process, and funding for a contract investigator.[51]

41. Alaska Jud. Council, *Minutes*, 1–2 (May 19, 1959).
42. *See* 1967–1968 ALASKA JUD. COUNCIL FIFTH REP. 36; 1971–1972 ALASKA JUD. COUNCIL SEVENTH REP. 25.
43. 1964–1966 ALASKA JUD. COUNCIL FOURTH REP. 3–6; 1967–1968 ALASKA JUD. COUNCIL FIFTH REP. 5–10.
44. 1962–1963 ALASKA JUD. COUNCIL THIRD REP. 30–31; 1964–1966 ALASKA JUD. COUNCIL FOURTH REP. 3–6; 1967–1968 ALASKA JUD. COUNCIL FIFTH REP. 5–10.
45. 1961 ALASKA JUD. COUNCIL SECOND REP. 10; 1964–1966 ALASKA JUD. COUNCIL FOURTH REP. 6–8.
46. 1964–1966 ALASKA JUD. COUNCIL FOURTH REP. 3.
47. 1969–1970 ALASKA JUD. COUNCIL SIXTH REP. 44–45 (citing SLA 1969, Ch. 101 and SLA 1970, Ch. 193).
48. SLA 1967, Ch. 83; SLA 1972, Ch. 160.
49. 1973–1975 ALASKA JUD. COUNCIL EIGHTH REP. 6.
50. *Id.*
51. *Id.* at 6–7.

In 1979, the Council re-assumed the administration of the Bar survey from the Bar and reformulated the questions. This move was a "significant step in furthering the intent of the constitution," asking Bar members for more information to better analyze applicants' abilities.[52] For the first time, the Council also announced plans to prepare a procedural manual for the selection process.[53] More revisions were made between 1981–82[54] and 1983–84.[55] In 1983, the Council completed a training seminar conducted by the American Judicature Society on all aspects of merit selection processes.[56] That training served as a basis for additional revisions for Council selection procedures, particularly its interview procedures.[57]

The Council compiled the judicial selection procedures and published them as a separate detailed document in its Twelfth Report covering 1983–84.[58] Those procedures provided that, after the interviews, the Council would submit a panel of "most qualified" nominees to the Governor.[59] This procedure went hand-in-hand with a new Council bylaw which stated its policy of seeking applicants of the "highest quality," which was passed in 1983.[60]

This language went unchanged until 2005, when the Council again reviewed its bylaws and selection procedures and more specifically restated its policy:

> The Judicial Council shall endeavor to nominate for judicial office and for public defender those judges and members of the bar who stand out as most qualified based upon the Council's consideration of their: professional competence, including written and oral communication skills; integrity; fairness; temperament; judgment, including common sense; legal and life experience; and demonstrated commitment to public and community service.[61]

52. 1978–1980 ALASKA JUD. COUNCIL TENTH REP. 1–2.
53. *Id.* at 3.
54. 1981–1982 ALASKA JUD. COUNCIL ELEVENTH REP. 2–4.
55. 1983–1984 ALASKA JUD. COUNCIL TWELFTH REP. 6–7.
56. *Id.* at 7.
57. *Id.*
58. *Id.* at F.
59. *Id.* at F-1.4.
60. Alaska Jud. Council Bylaws art. I, § 1 (May 26, 1983) ("The Judicial Council shall endeavor to nominate for judicial office and for public defender those judges and members of the bar whose character, temperament, legal ability and legal experience are demonstrated to be of the highest quality.").
61. Alaska Jud. Council Bylaws art. I, § 1 (2005). These criteria are further described in the Council's Selection Procedures. *See* Alaska Jud. Council, *Judicial Selection Procedures*, VI.A (2015). After many months of review and revisions to the bylaws and procedures, this revised bylaw was adopted. Alaska Jud. Council,

And:

> The Council shall select two or more candidates who stand out as the most qualified under the criteria set out in Article I, Section 1 of these bylaws, considering (a) other candidates who have applied; (b) the position applied for; and (c) the community in which the position is to be located.[62]

As part of the 2005 revision process, the Council adopted more detailed selection procedures, elaborating on the "most qualified" standard.[63] The 2005 changes resulted in the most detailed and specific procedures to date and remain largely unchanged to the present.

As we discuss next, discerning who is "most qualified" is intimately connected to what specific information is available. The Council has worked to incorporate more and better information about candidates throughout its history.

D. A Detailed Look at Key Procedures

i. Recruitment

Recruiting Applicants. The Council agreed at its November 15, 1962, meeting that the chair of the Council should announce judicial vacancies and solicit applications.

The Council chair announced vacancies and set a period of time for nominations. At its meeting on October 18, 1963, Council members agreed to allow a period of seven to ten days after learning the names of the applicants to decide whether to extend the deadline and recruit more applicants.[64] Over the next several decades, the Council considered different means of encouraging attorneys to apply for judicial positions. For example, at its November 16, 1972, meeting, members decided that they themselves would encourage "qualified and capable individuals" in each of their judicial districts to apply.[65]

Minutes, 1–2 (Sept. 22, 2005).

62. Alaska Jud. Council Bylaws art. II, § 4.

63. 2005–2006 ALASKA JUD. COUNCIL TWENTY-THIRD REP. D.

64. Alaska Jud. Council, *Minutes*, 6 (Oct. 18, 1963).

65. Alaska Jud. Council, *Minutes*, 2 (Nov. 16, 1972). At its January 7–9, 1965, meeting, a Council member suggested that the Council keep a running list of "people qualified for appointment as a superior court judge." Alaska Jud. Council, *Minutes*, 10 (Jan. 7–9, 1965). The members did not act on the suggestion at the time. The idea has re-surfaced in Council discussions a number of times over the intervening years. *See, e.g.*, Alaska Jud. Council, *Minutes*, 5 (Apr. 23, 1974). However, the Council has never decided to take this step.

Part of the Council's efforts to encourage applicants has included developing and publishing detailed selection procedures. The Council detailed all of its selection procedures for the first time in its Third Report: 1962–1963.[66] At its February 15, 1966, meeting, the Council adopted revised bylaws setting out its selection procedures.[67] These included sections on obtaining names of applicants; provisions ensuring that any names previously considered be available unless specifically withdrawn; provisions for the calling of witnesses, candidates, and others; and provisions for qualification polls.

Present Procedure. The Council announces a vacancy with a press release to media statewide, a notice to all active bar members, and a posting on its website. Council members and staff may actively encourage qualified persons to apply for vacancies, and the Council may consider whether to extend an application deadline to encourage more applications.[68]

ii. Application

The Application. The Council asked applicants for a letter response until the mid-1970s. Each application by letter needed to include basic information about the applicant's place and date of birth, background, education, marital status, employment, and community activities. It also needed to provide attorney references as well as "any other information which would assist the Judicial Council in evaluating the applicant's qualifications."[69]

In 1974, after the Council received funding to hire a permanent staff, the Council revised its selection process to require a standardized form rather than a letter.[70] The application form served to guide the personal interviews of each candidate.[71] In 1975, the Council began asking for a writing sample from each applicant, at Chief Justice Boochever's

66. 1962–1963 ALASKA JUD. COUNCIL THIRD REP. 10–12.

67. Alaska Jud. Council, *Minutes*, 3 (Feb. 15, 1966). The Council's current bylaws may be found in the 2016–2017 ALASKA JUD. COUNCIL TWENTY-EIGHTH REP. B.

68. To view the Council's selection procedures in full, please visit the Council's website at http://www.ajc.state.ak.us/selection/procedures/procedures. The selection procedures are also found in the Council's 2015–2016 ALASKA JUD. COUNCIL TWENTY-EIGHTH REP. D.

69. *See* Draft Letter to Alaska Bar Association Members (Feb. 20, 1962).

70. *See* Letter to Bar Association (Nov. 2, 1976) (soliciting applications and requiring that potential applicants request an application form from the Council office). The previous year, the Council was still soliciting applications by letter. *See, e.g.*, Letter to Bar Association Members (Feb. 20, 1975).

71. 1976–1977 ALASKA JUD. COUNCIL NINTH REP. 4.

suggestion.[72] The samples were "scrutinized and evaluated by the Council to assess the professional legal skills of the candidate, his capacity for abstract thought, and his ability to communicate in writing."[73]

Over the years, more questions were added to the standardized form to elicit more information—and more *verifiable* information[74]—about the applicants. In the early 1980s, the Council undertook a complete revision of the application based on a review of other states' procedures and of hiring techniques for top management in businesses and government.[75] The revised form included more questions on employment history, bar admissions and discipline, and credit and criminal history.[76]

Present Procedure. Applicants complete a twenty-two-page form with both public and confidential sections.[77] The public section includes a detailed legal work history, education and continuing legal education courses, military service, public criminal record, civil cases, public discipline matters, public and bar service, and a section for applicants to provide the reasons why they are seeking appointment and the special experience and qualities they bring to the position. The public section includes names of two general character references and three professional references, and a list of six cases including contact information for the lawyers and judge in the case (three with trials) that the applicant has participated in during the past three years. The confidential section of the application includes contact information, family details sufficient to determine possible conflicts of interest, confidential discipline matters, and other conflict of interest information. The applicant must also provide two photos,[78] a writing sample, waivers of confidentiality for various records, and a 150-word biography for publication on the Council's website.[79]

Applicants may submit a single application for several positions if the Council is recruiting for more than one vacancy at a time. If another

72. Alaska Jud. Council, *Minutes*, 3 (Oct. 30, 1975).
73. 1973–1975 ALASKA JUD. COUNCIL EIGHTH REP. 6.
74. 1981–1982 ALASKA JUD. COUNCIL ELEVENTH REP. 2, 4.
75. *Id.* at 4.
76. 1983–1984 ALASKA JUD. COUNCIL TWELFTH REP. 7.
77. The application form is available online at http://www.ajc.state.ak.us/sites/default/files/imported/selection/application1-2018.pdf (last visited Nov. 24, 2018).
78. At the October 15, 1968, meeting, the Council agreed to require that each applicant submit an "unretouched photograph no smaller than two by three inches." Alaska Jud. Council, *Minutes*, 19 (Oct. 15, 1968). This requirement was dropped for some period of time. The Council now asks applicants for a photo "to assist members in recalling the interviews."
79. Information about the Council's current vacancies, including the applicant biographies, is at http://www.ajc.state.ak.us/selecting-judges/current-judicial-vacancies (last visited Nov. 24, 2018).

vacancy occurs within six months of the most recent application, the attorney may "roll over" the application by notifying the Council. Applicants are required to supply new or updated information and may substitute information if they wish.

The Council continues to require that each applicant submit a recent writing sample, prepared solely by him or herself.[80] The Selection Procedures note that staff evaluate the samples for "organization, use of language, correct grammar and syntax, and other characteristics of good writing. Staff also review the samples for the quality of the applicant's legal research and analysis."[81]

iii. Bar Survey

Delegates to the Constitutional Convention expected the judicial selection process to include input on applicants from their peers in the bar.[82] The Council began surveying bar members about judicial applicants during its first selection process, tallying the results themselves.[83] The questions and the manner of survey and analysis have changed over time to better provide information essential to Alaska's merit selection process.

Who Conducts the Survey? In 1962, the Council re-affirmed its commitment to bar surveys and voted to conduct qualification surveys for all future vacancies.[84] By 1968, the Council's Fifth Report noted that the chair had conducted the bar survey in the past, but that "function has since been delegated to the president of the state bar association."[85] The Alaska Bar Association continued to carry out the survey and share the results with the Council until 1979, when the Council voted to begin conducting the survey under its own auspices again.[86]

How is the Survey Structured? In 1962, the Council introduced the first of many changes to the survey form, allowing bar members to grade each candidate using a scale of 1–10.[87] The bar survey asked "pertinent questions on such qualifications as impartiality, legal experience, legal ability, integrity, temperament, industry, and other matters concerning

80. Alaska Jud. Council, *Application for Judicial Appointment*, 14 (Aug. 2017). *See also,* 2015–2016 ALASKA JUD. COUNCIL TWENTY-EIGHTH REP. D-2 and D-4.
81. 2015–2016 ALASKA JUD. COUNCIL TWENTY-EIGHTH REP. D-4.
82. ACC at 585, 594, and 687.
83. Alaska Jud. Council, *Minutes*, 1 (July 16–17, 1959).
84. Alaska Jud. Council, *Minutes*, 4 (Jan. 13, 1962).
85. 1967–1968 ALASKA JUD. COUNCIL FIFTH REP. 36.
86. The Council discussed the matter and members agreed that they should choose an in-state contractor, and that the results of the survey should not be released to the media until after the Council made its nominations to the governor. Alaska Jud. Council, *Minutes*, 3–4 (Nov. 9, 1979).
87. Alaska Jud. Council, *Minutes*, 7 (Mar. 17–18, 1962).

each applicant."[88] The survey form allowed respondents to write narrative comments about applicants' performance, temperament, and other qualities related to suitability for a judgeship. Although the questions have changed during the past fifty-plus years, the 2018 bar survey rating criteria are Professional Competence, Integrity, Fairness, Judicial Temperament, Suitability of Experience, and Overall Rating, similar criteria to those described in 1963.[89]

The contracted analyst reports responses based on personal experience or professional reputation in a summary form, with a focus on responses from attorneys with direct professional experience with the applicant. This practice was first reported in the Council's 1985–1986 report,[90] but earlier surveys had asked about the amount and type of respondents' experience with judicial applicants.

Who Sees the Survey Results? Originally, bar survey results were shared only with Council members.[91] In 1963, the bar presented a list of requests to the Council, including that it be allowed to perform the polling or circulate the results among its members.[92] The bar conducted the survey between about 1968 and 1979, and, over time, policies changed so that the results became public.[93]

At the June 19–20, 1980, meeting, Council members considered whether they should continue to ask for narrative comments, because "some such remarks are sarcastic, frivolous, or degrading to the applicants."[94] Members stated that they found the comments helpful and

88. 1962–1963 ALASKA JUD. COUNCIL THIRD REP. 10–11.

89. Copy of 2018 bar survey available from Council on request.

90. 1985–1986 ALASKA JUD. COUNCIL THIRTEENTH REP. D-2.

91. At the Council's October 17–18, 1963, meeting, the bar association asked the Judicial Council to allow it to conduct the bar survey and to have the bar results circulated to the association's members. That suggests that the Council had not shared the results of its previous surveys with the bar or public. The Council decided at that time to continue to keep the survey results confidential and not to share them with the Alaska Bar Board of Governors or the public. Alaska Jud. Council, *Minutes*, 2 (Oct. 17–18, 1963).

92. Alaska Jud. Council, *Minutes*, 3 (Oct. 17–18, 1963).

93. The first mention of sharing the bar survey results with the governor came at the December 16, 1971, Council meeting. 1971–1972 ALASKA JUD. COUNCIL SEVENTH REP. 9. At the November 16, 1972, meeting, less than a year later, the Council "expressed noticeable dissatisfaction with the practice of releasing the poll results to the public before the Judicial Council could consider the candidates." *Id.* at 20. Throughout these years, the Alaska Bar Association controlled the bar survey and apparently had decided to release the results to the public without consulting the Council members. Members discussed "the possible conduct of the poll by the Judicial Council itself." *Id.* at 21.

94. Alaska Jud. Council, *Minutes*, 2 (June 19–20, 1980).

would ask for "serious comments only."[95] The Council also chose to notify survey respondents that the candidates would see the comments.[96]

Present Procedure. The Council contracts with an independent research organization to conduct the surveys. Applicants receive ratings on a 1 (poor) to 5 (excellent) scale, and respondents are encouraged to provide signed narrative comments. The survey contractor provides these comments to the Council staff, along with numerical ratings analyzed in a standardized series of tables, and detailed results for each applicant.[97]

If an applicant is being evaluated on the survey for more than one position, the name appears separately for each position, and the results are analyzed separately. This allows attorneys responding to the survey to note that an applicant could be better suited for one position over another position, and allows a comparative analysis to other applicants for the same position.

Council staff reviews the comments and redacts any information that could identify a respondent, including case names, party names, dates, and references to the bases for the comment (e.g., reputation, work associations, etc.). The Council shares each applicant's ratings and redacted comments with that applicant in a confidential letter. Applicants have a week to consider their survey ratings and edited comments. After that, the Council publishes the numerical survey ratings. The comments are never published or shared with any other party, including the governor.[98]

The Council began surveying respondents electronically in 2004.[99] The Council surveys all active, inactive, and retired members of the bar who reside in Alaska and have email addresses.[100] It also surveys all active out-of-state members who have email addresses. A handful of active in-state members still receive a paper survey.[101]

iv. Investigation

1. Certification of Physical Capacity to Serve. In 1961, Anchorage Superior Court Judge Earl Cooper became physically incapacitated, and the Council recommended to the Supreme Court that he be given early

95. *Id.*
96. *Id.* at 2–3.
97. Alaska Jud. Council, *Judicial Selection Procedures*, Section III.A (2015).
98. The Council's present procedures for the bar survey are set out at D-5 to D-7, 2015–2016 ALASKA JUD. COUNCIL TWENTY-EIGHTH REP.
99. 2003–2004 ALASKA JUD. COUNCIL TWENTY-SECOND REP. 6.
100. 2015–2016 ALASKA JUD. COUNCIL TWENTY-EIGHTH REP. D-5, D-6.
101. *Id.* at D-6.

retirement for medical disability.[102] The Council then voted unanimously to require applicants to "present written evidence of physical capacity to serve."[103] After that, the Council required applicants to provide a doctor's letter certifying their physical health.[104] In 1976, the Council agreed that "applicants should be required to submit new medical reports with each application."[105] The Council discontinued its medical certification requirement in 1993 or 1994,[106] possibly due to concerns about the application of the Americans with Disabilities Act.[107]

Present Procedure. The Council continues to require applicants to respond to a question about their ability to perform job-related duties: "Is there any reason why it might be difficult for you to perform fully all of the requirements of this position as set out in the judicial position description attached to this application? If [yes], please explain how you will be able to perform job-related functions, with or without reasonable accommodation."[108] Applicants also sign a waiver of confidentiality that allows the Council to obtain "all confidential and non-confidential documents, records and information concerning [the applicant] that the Council may request."[109]

2. Credit and Criminal History Materials; Bar Files. The Council has investigated applicants since its earliest meetings. Council members initially conducted these investigations themselves, employing a contract investigator in the mid-1960s. At its May 28, 1981, meeting, members decided to request a standard credit report for each applicant, and to review each applicant's criminal history using records provided by the Department of Public Safety.[110]

The Alaska Supreme Court issued Order 489 in 1982 permitting the Council to ask the bar association for the admission and discipline files for all applicants.[111] The Council uses these files to verify information on

102. Alaska Jud. Council, *Minutes*, 3 (Jan. 13, 1962).
103. *Id.* at 4.
104. *See, e.g.*, 1983–1984 ALASKA JUD. COUNCIL TWELFTH REP. F-1.1.
105. Alaska Jud. Council, *Minutes*, 1 (Jan. 8, 1976).
106. *See* 1990–1992 ALASKA JUD. COUNCIL SIXTEENTH REP. D-1 (listing a physician's certification of the applicant's good health as a requirement); 1993–1994 ALASKA JUD. COUNCIL SEVENTEENTH REP. D-1 (not listing a physician's letter as a requirement).
107. *See* Alaska Jud. Council, *Minutes,* 7 (June 28, 1993); Alaska Jud. Council, *Minutes*, 2 (Apr. 22, 1994).
108. Alaska Jud. Council, *Judicial Application Form*, 19, http://www.ajc.state.ak.us/sites/default/files/imported/selection/application1-2018.pdf (last visited Aug. 3, 2018).
109. *Id.* at 20.
110. Alaska Jud. Council, *Minutes*, 2 (May 28, 1981).
111. 1981–1982 ALASKA JUD. COUNCIL ELEVENTH REP. 4.

candidates' applications and to identify other areas of a candidate's background for investigation. Council staff review and summarize information from the discipline files for the Council to consider.

Present Procedure. The Council's procedures for these investigations have changed little over the years. Today, the Council continues to receive bar files and credit and criminal history reports. Staff carries out all investigations. If staff members have questions after reviewing the files, they contact applicants and provide an opportunity for them to respond in writing.

3. References, Employment Letters, Counsel Questionnaires: **Present Procedure.** The Council asks each applicant for the names and contact information for two general character references, three professional references, and for all employers for whom the applicant worked in a legal capacity. The Council asks each of these references and employers for a candid assessment of the applicant's qualifications and past job performance. Applicants also provide the names of attorneys and judges involved in six of their recent cases. The Council asks each of these individuals to evaluate how the applicant performed in that case.[112] Reference letters and counsel questionnaires are kept confidential unless the writer gives the Council written permission to share them with the governor if the applicant is nominated.[113] The applicant is never given any information about these letters.

4. Other Investigations. Meeting minutes from November 9–10, 1966, noted that the chair solicited information about the "character and qualifications of the candidates with assurance that all statements contained therein would be held in strict confidence."[114] Over time, Council members began to receive more materials about applicants, albeit only at the time of their meetings. At the February 1968 meeting, the minutes refer to members reviewing "files and reference letters made available by the secretary." [115] The chair also handed out "individual reports on the candidates which were made by William Behan, who had been employed for such purpose."[116] After 1973, the Council discontinued

112. These evaluations of specific case performance are referred to as "counsel questionnaires."

113. Alaska Jud. Council, *Judicial Selection Procedures*, Part II.B, http://www.ajc.state.ak.us/selection/procedures/procedures (last visited Aug. 30, 2018).

114. Alaska Jud. Council, *Minutes*, 10 (Nov. 9–10, 1966).

115. Alaska Jud. Council, *Minutes*, 5 (Feb. 19–20, 1968).

116. *Id.*

the use of hired investigators and staff began to perform needed investigations.[117]

Present Procedure. Council staff investigates questions raised by information from the bar survey comments, public comments, reference letters, counsel questionnaires, and any other source of information that comes to its attention between the deadline for applications and the time of the interview. Staff may follow up on questions raised by the interviews and provide additional information to Council members before they deliberate. The investigations can include reviewing social media, listening to tapes in court cases or reviewing case files, interviewing applicants and others, and any other appropriate form of investigation. Results of the investigations generally are shared only with Council members.[118]

v. Interviews

Initially, the Council only conducted interviews when it saw a particular need. Aside from specific instances where the Council saw a need to interview a particular applicant, members did not seem to perceive a need for interviews. One of the first applicant interviews on record occurred during the March 17–18, 1962, meeting when the Council invited Ralph Moody to discuss concerns about his medical file (it is not clear how the Council had access to the file).[119] Mr. Moody appeared on short notice.[120] He told the Council that he was fit, and that his doctor had recommended that he "eat no fat, use no alcoholic beverages, and should get adequate exercise."[121]

The Third Report: 1962–1963 noted that the Council reviewed the results of the bar survey, and "[t]hereafter the qualifications of each candidate are discussed in turn by each member of the council, and any

117. Alaska Jud. Council, *Minutes*, 4 (Sept. 19, 1973) ("The executive director shall be responsible for conducting such inquiries as may be necessary for decisions by the Council concerning the judicial qualifications of all applicants.").

118. Alaska Jud. Council, *Judicial Selection Procedures*, Part II.B, http://www.ajc.state.ak.us/selection/procedures/procedures (last visited Aug. 30, 2018).

119. Alaska Jud. Council, *Minutes*, 5 (Mar. 17–18, 1962).

120. The Council was meeting in Juneau, and Mr. Moody was the State's Attorney General at the time, working in Juneau. *Id.*; *List of Attorneys General of State of Alaska*, ALASKA DEPT. OF LAW, http://law.alaska.gov/department/ag_past.html (last visited Oct. 19, 2018).

121. The Council nominated him for the Anchorage Superior Court position vacated by Judge Cooper, who had just retired because of medical problems, which may have accounted for the Council's concern about Moody's physical condition. Governor Egan appointed him, and he served until 1984. *Former Judges*, ALASKA JUD. COUNCIL, http://www.ajc.state.ak.us/judges/former (last visited Oct. 19, 2018).

member asks questions of other members who may be personally acquainted with one or more of the several applicants."[122] The situation seemed to change by 1965, when "the names of applicants were reviewed to see whether any Council members desired to interview any applicants."[123] At that same meeting, the Council invited Judges Hepp and Rabinowitz to appear to talk about applicants' qualifications.[124] Near the end of the meeting, the Council asked Judge Rabinowitz questions about his own application to the supreme court after declining to stand for retention, and "stating his intention to leave the state."[125]

The next discussion of applicant interviews comes at the October 30 to November 1, 1968, meeting of the Council.[126] Some applicants indicated before the meeting that they would like to appear personally, and were "available to be heard at the Council's pleasure."[127] A number of significant changes occurred at that meeting, including a decision that "each applicant appear personally before the Council at his own expense."[128] The policy to interview all applicants has been in place since that time, apart from a brief departure in the mid-1980s.[129]

The 1968 discussions also addressed whether the interviews would be held in public or in executive session. Although the chair said that executive sessions had been the past practice "when personal matters came up," the prior minutes make few mentions of executive sessions on the record.[130]

The topic of executive session interviews came up again at the September 16, 1970, meeting when the press wanted to attend the interviews. The Council decided that the press could take pictures of the applicants but could not sit in on executive sessions. Members voted for

122. 1962–1963 ALASKA JUD. COUNCIL THIRD REP. 11.
123. Alaska Jud. Council, *Minutes*, 5 (Jan. 7–9, 1965).
124. *Id.* at 6.
125. *Id.* at 8. Then-Judge Rabinowitz was nominated by the Council on a 4-3 vote, appointed by Governor Egan, and served on the supreme court until 1997, including four terms as chief justice.
126. Alaska Jud. Council, *Minutes*, 2 (Oct. 30–Nov. 1, 1968).
127. *Id.*
128. *Id.* at 20. The question of expense to the applicant went through changes after that date, with the Council paying for applicant travel for several years. 1969–1970 ALASKA JUD. COUNCIL SIXTH REP. 1 ("All applicants are then brought to a meeting of the council, at the expense of the Council, for personal interviews.").
129. The Council has at various times discussed the pros and cons of interviewing all applicants. For example, is it necessary to re-interview an applicant who recently applied for the same level of court? Could the Council save time by interviewing only some applicants? How would those decisions be made? Each time, Council members decided the best process includes interviews of all applicants.
130. Alaska Jud. Council, *Minutes*, 5–7 (Oct. 30, 1968).

an executive session, so they could ask applicants questions from their confidential files.[131]

Present Procedure. Today, the Council continues to interview each applicant. Applicants pay their own travel expenses, although the Council bylaws do allow the Council to pay for expenses in its discretion.[132] If the Council and applicant agree to a telephone or video-conference interview, the Council will pay.[133] The Council still begins its meetings in public session, but now applicants may choose between a public interview or one in executive session.[134]

vi. Public Input

1. Location of Meetings. Since its first meeting in Juneau in 1959, the Council has met regularly in different communities around the state.[135] For most of the 1960s, judges sat only in Anchorage, Fairbanks, Juneau, and Nome.[136] The Council made a point of meeting in those cities, as well as the communities where its members lived to hear from citizens around the state.[137] At these meetings, the Council considered applicants for open vacancies, without regard to the location of the judgeship.[138] The Council spelled out its policy at that time in its Third Report, 1962–1963: "The places were selected following a policy of the Council to meet in the residence location of its respective members. . . . Local residents and other

131. Alaska Jud. Council, *Minutes*, 5–6 (Sept. 16, 1970).
132. ALASKA JUD. COUNCIL, Bylaws, art. VII, § 3(C).
133. *Id.*; *see also* 2015–2016 ALASKA JUD. COUNCIL TWENTY-EIGHTH REP. B-7.
134. 2015–2016 ALASKA JUD. COUNCIL TWENTY-EIGHTH REP. D-9.
135. In 1959 the Council met in Juneau, Fairbanks and Seward. Alaska Jud. Council, *Minutes*, 1 (May 18–19, 1959); Alaska Jud. Council, *Minutes*, 1 (June 29–30, 1959); Alaska Jud. Council, *Minutes*, 1 (July 16–17, 1959); Alaska Jud. Council, *Minutes*, 1 (Oct. 12–13, 1959). In 1960, it met in Anchorage. Alaska Jud. Council, *Minutes*, 1 (Mar. 12–13, 1960). In 1961, it met in Anchorage and Juneau. 1961 ALASKA JUD. COUNCIL SECOND REP. 1–3. In 1962–1963, it met in Anchorage, Juneau, Fairbanks, Kotzebue, and Ketchikan. 1962–1963 ALASKA JUD. COUNCIL THIRD REP. 3-10. In 1965, it met in Fairbanks and in 1966, it met in Anchorage, Juneau, and Ketchikan. 1964–1966 ALASKA JUD. COUNCIL FOURTH REP. 16–25. In 1967, the Council met in Nome and Ketchikan. 1967–1968 ALASKA JUD. COUNCIL FIFTH REP. 18–22. In 1968, the Council met in Juneau, Anchorage, and Sitka. *Id.* at 22–35.
136. *See Historical Selection Log 1959–1968*, ALASKA JUD. COUNCIL, www.ajc.state.ak.us/selecting-judges/historical-selection-log (last visited Oct. 22, 2018).
137. *See* TWENTY-EIGHTH REP *supra* note 133.
138. For example, at the 1967 meeting in Nome, the Council nominated applicants to fill two superior court judgeships in the Third Judicial District (Kotzebue is in the Second Judicial District). 1967–1968 ALASKA JUD. COUNCIL FIFTH REP. 18.

persons have appeared before the council at every meeting to present points of view on topics of interest to the council."[139]

Members discussed the locations of the Council's meetings and public hearings in detail at its April 30, 1970, meeting.[140] At that time, legislators were encouraging the Council to hold hearings in more remote areas.[141] Council members recognized that holding meetings in communities like Petersburg, Kodiak, Kenai, and Ketchikan would allow residents to directly advocate for a judge to sit in their community, as well as talk about problems in their areas.[142] On the other hand, the Council was paying for applicants' travel at the time, and bringing applicants for an Anchorage judgeship to a smaller community could become too expensive. The Council resolved the situation by agreeing to meet in those communities before the end of that fiscal year.[143]

Present Procedure. The Council now meets in the community of the judicial vacancy. This means that the Council will often travel to multiple communities during a single meeting. A single meeting could travel to Bethel, Utqiagvik, Kenai, Anchorage, Fairbanks, and Juneau.[144] Applicants now pay for their own travel expenses, unless the interview happens via Skype or teleconference (both happen infrequently).[145]

2. Public Hearings. The Council has held public hearings throughout its history. One of the first mentioned in its minutes was in January of 1962, considering the retirement of Judge Earl Cooper for medical reasons.[146] The Council often invited local people to testify about justice system issues[147] in their communities without scheduling a formal hearing. At its May 23–24, 1963, meeting in Kotzebue, "[t]he matter before the council was interrupted for the purpose of meeting with [the local state trooper and the deputy magistrate] who 'reported on juvenile delinquency problems in the Kotzebue village area.'"[148]

At times, the Council recorded communications from the public about the selection process. At its May 23–24, 1963, meeting, one of the

139. 1962–1963 ALASKA JUD. COUNCIL THIRD REP. 9–10.
140. Alaska Jud. Council, *Minutes*, 11–12 (Apr. 30, 1970).
141. *Id.* at 11.
142. *Id.* at 11–14.
143. *Id.* at 14.
144. 2015–2016 ALASKA JUD. COUNCIL TWENTY-EIGHTH REP. D-9.
145. Alaska Jud. Council, *Judicial Selection Procedures*, Part V.A, http://www.ajc.state.ak.us/selection/procedures/procedures (last visited Aug. 30, 2018).
146. 1962–1963 ALASKA JUD. COUNCIL THIRD REP. 3.
147. The Council solicits input about justice system issues pursuant to its constitutional duty to "conduct studies for improvement of the administration of justice." ALASKA CONST., art. IV, § 9.
148. Alaska Jud. Council, *Minutes*, 4–5 (May 23–24, 1963).

members "noted receiving a letter criticizing the Council on the ground that no Republicans had been appointed as judges."[149] The Council agreed to take no action on the letter.[150]

Throughout the years, the Council returned to the topic of public participation in the selection process. At its December 16, 1971, meeting, the Council passed a motion calling for public notice of vacancies in the media, and an invitation to the public to confidentially comment on applicants.[151] At the April 14, 1972, meeting, Council members voted to publish the phone numbers of Council members who lived closest to the area of a vacancy to take public comments and information about applicants.[152]

At its September 29, 1973, meeting, the Council endorsed a new program to encourage public input into Council decisions on judicial selection and studies to improve the administration of justice.[153]

The appropriate extent of the public's role depends on how much information the public has about the applicants that is relevant to the selection process. Over the years, the Council has discussed a range of possibilities, from keeping applicant names entirely confidential, to the present process, where the Council publishes applicants' names after the application deadline. At its June 21, 1974, meeting, Council member Eugene Wiles, who had studied other states' practices, said that "Colorado attempts to maintain complete confidentiality of the names of applicants, but that such a procedure would never be accepted in Alaska."[154] Members agreed that the Council would continue to disclose applicants' names to "obtain[] as much input as possible from the public . . . ."[155]

In 1989 and 1990, the Council announced that it had renewed its use of public hearings for each judicial vacancy.[156] In 1990, the Council began to set aside a portion of each selection meeting to take public comments and testimony. At that time, participation ranged from four to thirty or more persons, depending on the community and number of candidates. The Council noted that citizens in smaller communities were particularly interested in speaking directly with Council members.[157]

149. *Id.* at 6.
150. *Id.*
151. Alaska Jud. Council, *Minutes*, 2 (Dec. 16, 1971).
152. Alaska Jud. Council, *Minutes*, 6 (Apr. 14, 1972).
153. Press Release, Alaska Jud. Council (Oct. 1, 1973) (on file with author).
154. Alaska Jud. Council, *Minutes*, 3 (June 21, 1974).
155. *Id.* at 4.
156. 1989–1990 ALASKA JUD. COUNCIL FIFTEENTH REP. 5.
157. *Id.*

Present Procedure. The Council encourages public participation in the selection process by publicizing applicants' names, publishing the bar survey ratings, providing a prominent place on its website for public comment, giving public notice of its meetings, and holding public hearings in the community of the judicial vacancy at each meeting whenever the Council is interviewing applicants.[158] Most public hearings, particularly those in smaller towns, draw a sizable number of local citizens to comment on applicants and the selection process.

vii. Voting

One indispensable procedure is Council voting. The Constitution requires that the Council act by "a concurrence of four or more members,"[159] so the Council has always required four affirmative votes to nominate a judicial applicant.[160]

The question about whether, and when, the chair is permitted or required to vote has been a source of some confusion, and was even the subject of a question at the Constitutional Convention.[161] The issue matters because of the balance the framers built into the Judicial Council: three Alaskan attorneys representing "the profession," three non-attorney Alaskans representing the current political thought,[162] and the chief justice, who acts as chair. The Council has faced criticism over the years because of the concern that a chief justice's ability to vote has the potential to tip the balance in favor of professional interests over the wider public interest.

At the Constitutional Convention, the chief justice's position on the Council was described repeatedly as *ex officio*. That term was incorporated into the Constitution. The chief justice's position on the Council was by virtue of his position as the head of the court system and judicial branch of Alaska's government. When the Constitution was adopted, the role of chief justice did not rotate and it was a position appointed by the governor.[163] It was anticipated that the chief justice would be one person until that person's death, or at least until non-retention, retirement, or resignation.[164] All other Council members served staggered, six-year

158. 2015–2016 ALASKA JUD. COUNCIL TWENTY-EIGHTH REP. D-7.
159. ALASKA CONST. art. IV, § 8.
160. Council staff conducted a comprehensive review of the Minutes in November 2016 and found no instances of any applicant being nominated on the basis of fewer than four affirmative votes. Memorandum from Susie Mason Dosik to Alaska Judicial Council (Nov. 23, 2016) (on file with author).
161. ACC at 686.
162. ACC at 695.
163. ALASKA CONST. art. IV, § 2(b) (1956); ACC at 684.
164. ACC at 684.

terms. The chair would therefore, by virtue of the office, serve as an institutional presence on the Council, bringing long-term stability and continuity.

The delegates saw the chief justice's role as presiding officer of the Council. The delegates intended that the chief justice, like all presiding officers, would have full voting rights. They recognized that, according to Robert's Rules of Order, a presiding officer had voting rights, voting last and only when necessary, to avoid unduly influencing the body over which he presided.[165]

Despite the delegates' intent, the question of the chief justice's voting rights arose at the first meeting at which newly-appointed Chief Justice Buell Nesbett presided.[166] At that meeting, the Council adopted Robert's Rules of Order as its governing procedure, unless the Council had specifically set out its own procedure. The Council passed a rule of procedure specifying that "all members of the Judicial Council including the Chief Justice shall vote on all questions at all times except where the Chief Justice determines that for specific reasons he should not vote."[167] At that meeting, the Chief voted on all eleven applicants for associate justice of the Alaska Supreme Court by written ballot.[168] This seeming conflict with the rule that the Chair should vote last and only when necessary is explained by the fact that from 1959 to 1969, the Council voted on all judicial nominations by secret paper ballot. Voting by ballot is an exception to the restriction on the chair's voting recognized by Robert's Rules of Order. When the voting is secret, there is little risk of undue influence from the chair.

Chief Justice Nesbett continued to vote via secret paper ballot throughout his tenure as chair of the Council. In January 20, 1966, while considering the first formal bylaws, attorney member Michael Stepovich again raised the question of whether the chair could vote.[169] Chief Justice Nesbett "clarified the history of the present provision and stated he would under no circumstances consider relinquishing a right to vote on Council matters."[170] Formal bylaws were adopted by unanimous consent at the Council's November 9–10, 1966, meeting.[171] The bylaws included a provision that mirrored its practice to that date: "All members of the

165. ACC at 686, 700–02. The draft language was ultimately adopted into the Constitution.

166. Alaska Jud. Council, *Minutes*, 2 (Mar. 12–13, 1960).

167. *Id.*

168. *Id.* at 3. No individual's vote was specifically identified, but the vote tallies indicated that seven votes were cast on each applicant. A chair voting by secret ballot was an exception specifically allowed in Robert's Rules.

169. Alaska Jud. Council, *Minutes*, 6–7 (Jan. 20, 1966).

170. *Id.*

171. Alaska Jud. Council, *Minutes*, 6 (Nov. 9–10, 1966).

Council except the Executive Secretary shall be entitled to vote on all matters coming before the council any rule of order or other rule notwithstanding."[172]

Chief Justice Nesbett retired on April 1, 1970. After the Chief Justice retired, some members worried about the chief having too much power over the Council's actions.[173] A bylaws committee was formed to consider a revision. Soon afterward, George Boney was appointed Chief Justice.

In his first meeting as chief justice and chair of the Council, Chief Justice Boney proposed a bylaw amendment restricting the chief justice's vote to circumstances involving a tie.[174] He remarked that, as a prior Council member, he had helped draft the bylaws and knew that the chief could vote, but he believed that the chief should vote only to break a tie.[175] He recognized that there could be cases when only five people were present and "you would have to have 4 votes to act."[176] Chief Justice Boney expressed that the Council should not be a rubber stamp for him, stressing the need for the Council members to be independent.[177] The proposal carried by unanimous consent.[178] The Chief Justice directed that the language be formally incorporated in the bylaw revisions.[179] This bylaw applied for the next thirteen years.

In 1983, as part of an overhaul of its bylaws, the Council amended the voting bylaw to its current version:

> All members of the Council present shall be entitled to vote on all matters coming before the Council, except that the chair shall

172. *Id.*

173. At the Council's April 30, 1970, meeting, the issue of the chief justice's voting rights again arose when Acting Chair Mike Stepovich reported that before retiring, Chief Justice Nesbett had unilaterally rescinded an action approved by the Council. Chief Justice Nesbett had cancelled the Council's upcoming trip aboard the ferry *Wickersham* that coincided with the judicial conference, purportedly because he believed that it would expose the Council to criticism. Alaska Jud. Council, *Minutes*, 15, 19–20 (Apr. 30, 1970).

174. Alaska Jud. Council, *Minutes*, 5 (June 18, 1970).

175. *Id.*

176. *Id.* "Ties" included 3-2 voting situations. *See, e.g.*, Alaska Jud. Council, *Minutes*, 90–91 (June 18, 1970) (In a voice vote on a council procedural matter (whether to call a member of the public forward to present testimony about a grand jury). Chief Justice Boney discussed that four votes were necessary and voted in favor of the motion, bringing the vote tally to 4-2 and causing the motion to carry. *Id.* This was because of the constitutional requirement of "a concurrence of four or more members." ALASKA CONST. art. IV, § 8.

177. Alaska Jud. Council, *Minutes*, 5–6 (June 18, 1970). This may have been a departure from previous Council culture, as Chief Justice Buell Nesbett was renowned for his strong will and, at times, imperious leadership. *See generally* Pamela Cravez, *A Revolt in the Ranks: The Great Alaska Court-Bar Fight*, 13 ALASKA L. R. 1, 1 (1996).

178. Alaska Jud. Council, *Minutes*, 125 (June 18, 1970).

179. *Id.*

> only vote when to do so would change the result. The Council shall act by concurrence of four or more members. All votes shall be taken in public session. Any member can vote in the affirmative or negative or abstain on any matter; [h]owever a member who wishes to abstain shall so indicate before the question to be voted on is called and shall disclose the reasons for abstaining. [180]

Since the amended bylaw was adopted, all Chief Justices have voted in 3–3 ties, and in all instances of 3 "yes" to 2 "no" votes, because the vote would change the result.[181]

viii. Transmission to the Governor and Reconsideration

The last step of the Council procedures is the transmission of the Council's nominees to the governor. From 1959 to 1963, the Council transmitted just the names of the nominees.[182] In 1963, the Council began including an offer to supply "biographical data" regarding the nominees to the governor, upon his request.[183] In 1965, the Council offered to send, upon the governor's request, any information from its files on the nominees including biographical information, reference letters, results of the bar survey, and all other information.[184] By 1970, the Council had begun routinely sending bar survey results and biographies of the nominees to the governor.[185]

Present Procedure. The Council's current practice is to transmit the names of the nominees to the governor as soon as practicable after voting on the nominations.[186] Council staff deliver the nominations, along with materials on each nominee, to the governor. The information includes: the Council's vote tally, each nominee's application (including

180. Alaska Jud. Council, *Minutes*, 5 (May 25–26, 1983).

181. Memorandum from Susie Mason Dosik to Alaska Judicial Council (Nov. 23, 2016) (on file with author).

182. *See, e.g.*, Letter from Alaska Judicial Council to Governor William A. Egan (Apr. 15, 1960) (on file with author).

183. Letter from Alaska Judicial Council to Governor William A. Egan (Oct. 18, 1963).

184. Letter from Alaska Judicial Council to Governor William A. Egan (Jan. 9, 1965).

185. Letter from Alaska Judicial Council to Governor Keith H. Miller (Nov. 9, 1970).

186. The Council voted recently to add a clause that would allow the Council to deviate from the above procedures "for good cause." Governor Walker had asked the Council to delay its transmittal of nominees while he was out of state for medical treatments. The delay in transmitting the nominees allowed Governor Walker more time to interview the nominees and to make the appointments. Alaska Jud. Council, *Judicial Selection Procedures,* Part VII.C.2; Alaska Jud. Council, *Minutes*, 1 (Nov. 22, 2016).

confidential sections), the numerical survey results, reference letters and counsel questionnaires that the author indicated should be sent to the governor, and any unsolicited materials the Council received unless the author requested confidentiality.

The governor must appoint a judge from the list of nominees. The Council will not consider requests for additional nominees unless the death, disability, or withdrawal of a nominee has left the governor with fewer than two nominees. In that case, the Council may reconsider its nominees and vote to provide further nominees, or re-advertise the position.[187]

III. EVALUATING THE EFFECTIVENESS OF ALASKA'S MERIT SELECTION PROCESS

The Council reviewed its work over the years to determine its effectiveness. Does Alaska have a strong bench, with judges who are stable, rarely subject to discipline, and judged to show integrity, fairness, diligence, impartiality, and good judicial temperament? The fact that voters have approved all but five of the judges standing for retention since statehood[188] suggests that Alaska's citizens respect their judges and the merit selection process.

- Alaska's judges are stable. More than half of the judges evaluated since 1976 have stood for at least two retention elections as trial court judges.[189] Others went on to appellate court positions, also serving for a total of at least two terms.[190]
- Only a handful of judges have received public discipline from the Alaska Commission on Judicial Conduct, and the

187. Alaska Jud. Council Bylaws art. VII, § 5; 2015–2016 ALASKA JUD. COUNCIL TWENTY-EIGHTH REP. B-8.

188. Justice Harry Arend was not retained by voters. In a March 1965 retention election, he was the target of the organized bar in an ongoing dispute between the Alaska Bar Association and the Alaska Supreme Court over who would control the bar. Pamela Cravez, *A Revolt in the Ranks: The Great Alaska Court-Bar Fight*, 13 Alaska L. Rev. 1, 28 (1996). The other four judges all were not retained after recommendations by the Judicial Council that they not be retained. ALASKA JUD. COUNCIL, SELECTING AND EVALUATING ALASKA'S JUDGES: 1984–2012 43 n.85. In addition to the judges mentioned in the footnote, Anchorage District Court judges Brewer and Vochoska were not retained in 1982 after non-retention recommendations by the Council. *Id.*

189. This does not include judges before 1976, the first year that the Council conducted statutory performance evaluations. 1976–2016 Retention Vote History, ALASKA JUD. COUNCIL, http://www.ajc.state.ak.us/sites/default/files/imported/retention/retvotes16.pdf (last visited Oct. 23, 2018).

190. Of the twenty-five appellate judges evaluated since 1976, seven had also been evaluated as trial court judges. *Id.*

number of jurisdictional complaints filed with the Commission has declined steadily over the past thirty years.[191]

- Perhaps the best measure of the success of the merit selection process is the performance evaluation process carried out for each judge when they stand for retention elections. This process includes assessments from hundreds of people for each judge, including peace and probation officers (trial court), social services professionals (trial court), jurors (trial court), and attorneys.[192] Overall, the evaluations consistently show that these groups approve of the performance of the judges.[193] The performance evaluations have improved over the years, as the Council's selection processes have matured.[194] For example, peace and probation officer overall evaluations of trial court judges on the ballot increased from 3.4 to 4.2 between 1984 and 2012.[195] From 1984 to 2012, attorneys' overall ratings of trial court judges increased from an average of 3.6 to 4.2.[196]
- An average of two-thirds of Alaskan voters approved the judges standing for retention election, between 1984 and 2012.[197] Although the averages vary by year, by level of court, and by judicial district, this consistent level of support shows strong approval by Alaska's citizens of their merit selection process.

The Judicial Council, with the help of citizens, the bar, and the courts, continues to work to improve the merit selection process.

IV. ALASKA'S MERIT SELECTION PROCEDURES: INTO THE FUTURE

The landscape of information about people—and therefore applicants—is ever-changing in this information age. Because the Alaska Constitution has provided, and the Council has exercised, considerable

191. ALASKA COMMISSION ON JUDICIAL CONDUCT 2017 ANNUAL REPORT, 21, tbl.6.
192. ALASKA JUD. COUNCIL, SELECTING AND EVALUATING ALASKA'S JUDGES: 1984–2012, 39 (July 2013).
193. *Id.* at 40–42.
194. *Id.* at 40–41.
195. *Id.* at 41
196. *Id.* at 40.
197. *Id.* at 45, tbl.10. About 84% to 87% of voters casting ballots in any given election also vote on the appellate judges standing for retention. *Id.*

flexibility in its process, it is certain that the procedures now in place will continue to adapt and change as available information changes.

One area of potential change could be in how applicants and others provide information to the Council. In 2018, applicants are still filling out paper applications or PDF files. The Council could move to a web-based application that would be more user-friendly to applicants and more efficient for generating reference letter and other requests. This could also facilitate data capture that the Council could use in its reports on the selection process.

The Judicial Council also faces the reality of a growing state. When the Council convened in 1959, it needed to nominate applicants for eleven original judicial seats.[198] A commission of unpaid volunteers could easily assess applicant qualifications based on personal knowledge and reliance on other professionals. Alaska now has more than seventy judges and in the last five years has averaged six to seven vacancies per year, with about eight applicants per vacancy.[199] The Council is now meeting to interview and nominate applicants four to five weeks per year, not including extensive preparation time. Given the considerable time investment, the Council may need to consider ways to reduce meeting time—possibly by streamlining the processing of repeat applicants, reducing the number of interviewees, or by reducing interview lengths.

The Council has the benefit of the flexibility granted in Article IV to devise its own procedures. Those procedures have served the state well in the past by providing useful and reliable tools for nominating the best qualified applicants for the judiciary. Alaskans can have confidence in those procedures, and those to be implemented, going into the next sixty years and beyond.

198. The Alaska Constitution authorized eight judges: three supreme court justices, one of whom would be Chief Justice, ALASKA CONST. art. IV, § 2, and five superior court judges, ALASKA CONST. art. IV, § 3. These provisions authorized the legislature to change the numbers of justices and judges. The Alaska Legislature almost immediately changed the number of superior court judges to eight. 1959 ALASKA SESS. LAWS ch. 50 § 25(1).

199. E-mail from Brian Brossmer to Susie Mason Dosik (Sept. 27, 2018) (on file with author).