

TRANSCRIPT OF
ALASKA BAR ASSOCIATION 2015 ANNUAL CONVENTION
PRESENTATION: "SEEKING THE 'TALLEST TIMBER' -
ALASKA'S MERIT SELECTION SYSTEM IN THE CROSSHAIRS"

May 13, 2015

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(Pages 2 to 5)

<p style="text-align: right;">Page 2</p> <p>1 (DVD)</p> <p>2 UNIDENTIFIED VOICE: More of that. So, ladies and</p> <p>3 gentlemen, I'd like now to begin with our Law Day luncheon</p> <p>4 presentation. It's my pleasure to be able to introduce today's</p> <p>5 luncheon program. As we celebrate Law Day and honor our system</p> <p>6 of justice, it is timely and appropriate to pause and reflect on</p> <p>7 the foundation of the rule of law in our state, which is, of</p> <p>8 course, the Alaska Constitution. Over 50 years ago our</p> <p>9 constitution's framers gathered here in Fairbanks in the dead of</p> <p>10 winter to craft what they hoped would be an enlightened and</p> <p>11 enduring document to guide Alaska's future, but perhaps the</p> <p>12 greatest significance to those of us in the legal profession are</p> <p>13 the provisions of the Judiciary Article which govern the</p> <p>14 structure and functioning of our court system, including our</p> <p>15 method of selecting judges.</p> <p>16 For over 50 years Alaska has employed a merit-based system</p> <p>17 which seeks to ensure that only the most highly qualified</p> <p>18 members of the bar attain the bench -- the tallest timber, in</p> <p>19 the words of one Constitutional Convention delegate. As you may</p> <p>20 know, there is a resolution currently pending in the legislature</p> <p>21 to amend the constitution and change our judicial selection</p> <p>22 process in a manner that threatens merits election. The effort</p> <p>23 is controversial and officially opposed by the Alaska Bar</p> <p>24 Association and the Alaska Court System. Our speakers today</p> <p>25 will explore the rationale behind the Judiciary Article and</p>	<p style="text-align: right;">Page 4</p> <p>1 Berkeley. He came to Alaska in 1970 directly from law school</p> <p>2 and clerked for the late justices John Dimond in Juneau and one</p> <p>3 of our most legendary characters here in Fairbanks, Jay</p> <p>4 Rabinowitz of Fairbanks. He has made his home in Alaska for</p> <p>5 over 40 years. He and his wife Anne raised four children here,</p> <p>6 and today all of their children either live in Alaska or</p> <p>7 maintain strong ties to the state. Three of his four children</p> <p>8 are lawyers, and the fourth is a legislative aide. Devotion to</p> <p>9 the law and to Alaska, clearly, runs in the blood of this</p> <p>10 family.</p> <p>11 Throughout his career Justice Carpeneti has been a staunch</p> <p>12 advocate for the merits election of judges. When current</p> <p>13 efforts to amend the Judiciary Article gained momentum in the</p> <p>14 legislature last year he knew he had to do something, so barely</p> <p>15 a year into retirement he interrupted his plans for a leisurely</p> <p>16 schedule to co-found Justice Not Politics Alaska, a nonprofit</p> <p>17 organization devoted to preserving the Judiciary Article and</p> <p>18 protecting our current system of judicial selection from</p> <p>19 increased political influence. Today he serves as the</p> <p>20 organization's co-chair and has spent much of the past year</p> <p>21 educating legislators and members of the public about the</p> <p>22 importance of fair and impartial courts. We are fortunate to</p> <p>23 have him here today to speak to us. I hope you'll join me in</p> <p>24 welcoming Bud Carpeneti.</p> <p>25 (Applause)</p>
<p style="text-align: right;">Page 3</p> <p>1 examine the many concerns that current efforts to amend it</p> <p>2 raise.</p> <p>3 We are very fortunate today to have someone with us who</p> <p>4 can speak directly to what Constitutional Convention delegates</p> <p>5 were thinking, because he was one of them. Vic Fischer has</p> <p>6 spent the past 60 years explaining and defending our</p> <p>7 constitution, and we are honored and delighted to have him with</p> <p>8 us today. He will be introduced after a brief presentation by</p> <p>9 our other guest speaker, Retired Justice Walter "Bud" Carpeneti.</p> <p>10 For most of us Justice Carpeneti needs no introduction.</p> <p>11 He's one of the most long-standing jurists in our state's</p> <p>12 history, devoting 32 years of his career to the Alaska -- to</p> <p>13 Alaska's judiciary. He was appointed in 1981 to the superior --</p> <p>14 as a superior court judge in Juneau, and in 1997 to the Alaska</p> <p>15 Supreme Court, where he served until his retirement in 2013.</p> <p>16 During his tenure on our state's highest court his colleagues</p> <p>17 elected him chief justice for the 2009 to 2012 term. As chief</p> <p>18 justice he promoted civic education, public understanding of our</p> <p>19 justice system and founded the Supreme Court Live program that</p> <p>20 has brought oral arguments to high schools across the state. He</p> <p>21 has served as the founding Alaska chair of the iCivics program,</p> <p>22 which was initiated by Retired U.S. Supreme Court Justice Sandra</p> <p>23 Day O'Connor.</p> <p>24 Justice Carpeneti earned his undergraduate degree in</p> <p>25 history from Stanford University. He has a law degree from U.C.</p>	<p style="text-align: right;">Page 5</p> <p>1 JUSTICE CARPENETI: Thank you, Jeff. It's not often that</p> <p>2 I come to a microphone and have to adjust it down for my height.</p> <p>3 Those remarks were very kind and probably a little over the top.</p> <p>4 I didn't do too much interrupting of my leisure time and I've</p> <p>5 used it well.</p> <p>6 Thank you for being here today. This should be an amazing</p> <p>7 program. I hope that it is, with Vic Fischer, one of only three</p> <p>8 surviving delegates to Alaska's Constitutional Convention here</p> <p>9 to talk about one of the crown jewels of our constitution, the</p> <p>10 Judiciary Article, Article IV.</p> <p>11 Before he joins us, however, you might be asking yourself</p> <p>12 why the subhead above, "Alaska's Merit Selection System in the</p> <p>13 Crosshairs," and the answer is easy: Senate Joint Resolution 3,</p> <p>14 a proposed constitutional amendment introduced by Senator Pete</p> <p>15 Kelly of Fairbanks, which in my view would gravely threaten the</p> <p>16 fairness, the independence and the excellence of our courts and</p> <p>17 open our state to at least the possibility of the kinds of</p> <p>18 abuses never seen here before, but, unfortunately, all too</p> <p>19 common in the other states. And to show you why I entertain</p> <p>20 that belief, I'd like to start with the theme of this year's</p> <p>21 convention, celebrating the Magna Carta and 800 years of</p> <p>22 opposing -- of the ongoing struggle to honor the notion of self-</p> <p>23 government in a nation of laws, not of men.</p> <p>24 It was, of course, a really revolutionary concept,</p> <p>25 challenging the divine right of the monarch in many ways, and as</p>

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1 The Globe and Mail said recently, it's been called democracy's
2 birth certificate and remains a powerful symbol of justice
3 triumphing over tyranny, especially in our time, when the
4 concepts of freedom and fairness are in constant flux. And I
5 thought that important because that quote comes from a couple of
6 months ago, not 800 years ago, and it shows that the struggle
7 continues to this day, and while kings are of no continuing
8 concern in this country, the imbalance of power brought by
9 either or threatened by either the executive or the legislature
10 poses a threat to the one branch of government meant to impose
11 limits on government and to protect individual rights: the
12 judiciary.

13 Returning to the days when kings were players in the
14 affairs of this country, our Declaration of Independence had
15 this to say about George III: "He has obstructed the
16 Administration of Justice, by refusing his Assent to Laws for
17 establishing judiciary powers. He has made Judges dependent on
18 his Will alone, for the tenure of their offices, and the amount
19 and payment of their salaries."

20 So even at the founding of our country this concern about
21 judicial independence was strong, and so our constitutional
22 framers took great care to create a judiciary that was
23 independent, specifying that judges could not be removed except
24 for cause and their salaries not diminished while they were in
25 office.

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1 And while the ratification of the constitution itself was
2 being debated, The Federalist and Alexander Hamilton in the
3 Federalist No. 78 made clear the central importance to the new
4 government of judicial independence. Now, in this quote it's
5 clear that he's talking about independence from encroachment by
6 the legislature, but the point remains the same. While Alaska's
7 framers took a different approach than lifetime appointment to
8 ensure independence, they, too, nonetheless, valued as highly as
9 the federal framers the notion that the judiciary must be
10 independent and beholden only to the law, and not to the will of
11 the executive or the legislature or even the public in a given
12 case.

13 The court in Marbury v. Madison in 1803, we've already
14 heard today from Professor Chemerinsky, then established the
15 doctrine of judicial review of the acts of the coordinate
16 branches to determine whether they complied with the
17 Constitution, thus establishing both the doctrine of judicial
18 review and cementing the doctrine of separate and coequal
19 branches of the government. And so we have the really important
20 concept of judicial independence, and I looked up The
21 Constitution Project. It's a bipartisan group, and I really
22 mean bipartisan. It's -- the folks that are -- sit on its board
23 comes from -- come from all ends of the political spectrum, and
24 they set this out and I think it's an important principle for us
25 to start off with:

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1 "'Judicial independence' is the principle that judges
2 should reach legal decisions free from outside pressures,
3 political, financial, media-related or popular. Judicial
4 independence means judges must be free to act solely according
5 to the law and their good-faith interpretation of it, no matter
6 how unpopular their decisions might be. It means judges need
7 not fear reprisals for interpreting and apply the law to the
8 best of their abilities. An independent judiciary is a
9 cornerstone not only of our justice system, but of our entire
10 constitutional system of government. Only a truly independent
11 judiciary, free of pressure from, and indebtedness to, political
12 parties, public officials, interest groups, and popular whim,
13 can be truly accountable to the public it serves."

14 And there's really two kinds of independence, and I think
15 both are important. First, decisional, as to the individual
16 judge and the individual case, and institutional, as to the
17 judiciary itself and its role as a fully co-equal branch of
18 government separate from the legislative and the executive
19 branches. As Sandra Day O'Connor has said, "The founders
20 realized there has to be someplace where being right is more
21 important than being popular or powerful, and where fairness
22 trumps strength. And in our country, that place is supposed to
23 be the courtroom."

24 So how did we arrive at the mid 20th century at the grail
25 of merit selection? I'd like to take two minutes to go through

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1 a real quick history of this subject. In broad terms, the 18th
2 century was the heyday of lifetime appointment, the 19th century
3 witnessed a populous reaction that led to elected judiciaries,
4 and the 20th century, in a reaction against the excesses of big
5 politics in judicial selection, trended toward merit selection,
6 utilizing independent nominating committees charged with
7 presenting lists of highly-qualified applicants to the governor
8 for appointment, with retention election to follow. That brings
9 us to 1955 and the Alaska Constitutional Convention, convened
10 almost 60 years ago, right in this city.

11 The 55 delegates represented a cross-section of the
12 territory of Alaska, with a diverse assortment of occupations
13 represented by the delegates. I had fun putting this together,
14 counting up who did what. It's not true that lawyers dominated
15 the convention. We've heard that in some of the arguments.
16 There were 13 lawyers. There were 55 delegates. There were
17 folks from all over the state and they represented all kinds of
18 occupations, miners and mining engineers, fishermen, self-
19 described housewives, pilots, clergy, engineer, farmer, builder,
20 photographer, teacher, et cetera, et cetera. It was a great
21 cross-section of Alaska of 1955.

22 The delegates had a good sense of the challenges before
23 them and they made great preparation to complete their tasks.
24 Tom Stewart, who would become the secretary to the
25 Constitutional Convention, as a member of the Territorial House

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<p style="text-align: right;">Page 10</p> <p>1 contacted various experts in state administration and contracted 2 with the Public Administration Service to prepare studies on 3 each of several subject areas that the constitution would have 4 to address. The judiciary committee was well organized and 5 efficient. Following its debates and discussions, which I hope 6 we will hear a lot about today from Vic Fischer, it adopted the 7 Judiciary Article, which was ultimately accepted, almost 8 unanimously, by the Constitutional Convention.</p> <p>9 The high points of the merit selection were nomination by 10 the Judicial Council, which was charged with finding the best 11 available candidates, the best available timber or the tallest 12 timber, as one of the delegates said, and sending on at least 13 two names to the governor. The council was to be composed of 14 three lawyers appointed by the Board of Governors of the Bar 15 Association, although historically the Board of Governors has 16 held an election in the judicial district involved and has, I 17 believe, always appointed the attorney prevailing in that 18 election, but it's technically appointment by the Board of 19 Governors, and then three laypersons appointed by the governor 20 and confirmed by the legislature, and then, finally, the chief 21 justice ex officio, who votes only when his or her vote would 22 affect the outcome. Essentially, the chief justice votes to 23 break ties, or if you have a three-to-two vote because 24 somebody's missing and there's three votes in favor sending a 25 person on, four are needed, then the chief votes in that</p>	<p style="text-align: right;">Page 12</p> <p>1 because, in my view, the Judiciary Article is a splendid example 2 of foresight and incredibly skillful drafting. Now there are 3 about 35 states that have some form of our system, and there 4 isn't a single state that wouldn't want our system in full." 5 So nirvana, we reached it. It took 200 years-plus 6 after -- well, it took a long time, took six centuries after 7 Magna Carta, and a long time even after the Federal 8 Constitution, but at least by statehood for Alaska we had got it 9 right, a system that looked for merit at the initial phase, and 10 then gave electoral politics its due in the appointment 11 itself -- the governor, after all, is the winner of the last 12 election and makes the final choice -- and turned it all over to 13 the people at a retention election three-plus years after 14 appointment and periodically thereafter.</p> <p>15 So end of the story, can we all go home and do something 16 else? Well, not quite. And the reason for that, and the reason 17 for the existence of Justice Not Politics Alaska, is Senate 18 Joint Resolution 3. In a nutshell, I'm not sure how readable 19 that is, it doubles the number of gubernatorial appointments to 20 the Judicial Council, and it requires the attorneys elected by 21 the bar to be confirmed by the legislature. Now, given a merit 22 selection system that has produced a judiciary free of the taint 23 of corruption for about six decades, free of the corrupting 24 influences of partisan elections -- and this is my personal and 25 probably biased view, but -- produced a judiciary that has</p>
<p style="text-align: right;">Page 11</p> <p>1 instance.</p> <p>2 Sorry, I'm one slide late. This is what should have been 3 up on the screen as I was just describing that. I'm really new 4 at this. Actually, I think I'm doing really well so far, so -- 5 (Laughter)</p> <p>6 This proposal, this outcome, was regarded as the best 7 compromise between competing values in judicial selection. As 8 George McLaughlin, who was chair of the judiciary committee 9 said, "The best compromise and the best solution to a vexing 10 problem between those who feel we should have lifetime tenure so 11 judges can be absolutely independent and those who feel we 12 should have short terms so that judges could be subject to the 13 popular will." And, of course, judges are subject to the 14 popular will now in terms of the retention elections which they 15 stand for every four, six, eight or 10 years, depending on which 16 court they occupy.</p> <p>17 As Jay Rabinowitz said, "Our state judicial system really 18 changed in 1955 through the wisdom of the delegates to the 19 Constitutional Convention. They rejected the concept of 20 straight partisan election of judges, and they rejected the 21 Federal appointment scheme which is Executive appointment, 22 confirmation by the Legislature and lifetime tenure on good 23 behavior. So they came up at that time with the Missouri Plan, 24 which is merits election, merit retention. This is probably one 25 of the greatest things that the Constitutional Convention did</p>	<p style="text-align: right;">Page 13</p> <p>1 performed excellently over the past 56 years of statehood, it's 2 not only fair, but I think incumbent to ask why change this 3 system.</p> <p>4 I've tried to listen carefully to the arguments of the 5 folks that -- have I gone the wrong way there? Yeah. I've 6 tried to listen carefully to the arguments of the folks that 7 have proposed SJR 3 and I've heard five rationales, and I will 8 say I think they have shifted quite a bit over the last two 9 years, but there are at least five identifiable reasons that are 10 given. Not one of them holds water, and I'd like to go over 11 each briefly in this presentation.</p> <p>12 The first argument is that, well, Alaska's an outlier in 13 the prominent role attorneys play on a judicial council and 14 somehow we should get in step with the rest of the country. You 15 know, in answering the outlier argument I'm really tempted to 16 say -- and I'm tempted to say this because it's true and because 17 it's enough of a response -- I'm tempted to say that as the 18 bumper sticker says, "We really don't give a damn how they do it 19 Outside."</p> <p>20 (Applause)</p> <p>21 And I say that because we should stick with merit 22 selection because it's the best system, even if no one else used 23 it, but I think it's important, also, to say that we're not such 24 an outlier. In 1955 it was already in use. As George 25 McLaughlin said in discussing the Missouri Plan that was in</p>

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1 effect, the whole theory of it is that a select -- and I'm going
2 to ask you in advance to disregard the gender indications in
3 this quote, because they can be off-putting, but this was almost
4 60 years ago:
5 "The whole theory of the Missouri Plan is that a select
6 and professional group, licensed by the state, can best
7 determine the qualifications of their brothers. It is
8 unquestionably true that in every trade and every profession the
9 men who know their brother careerists the best are the men
10 engaged in the same type of occupation. The theory was that the
11 bar association would attempt to select the best men possible
12 for the bench because they had to work under them."
13 So the idea was current then. It was thought about. The
14 reason was given. But beyond that, several states have moved in
15 whole or in part toward merit selection over the last 40 or so
16 years, and this is a rough approximation of those -- this is an
17 approxima-- this is a statement of those states that have
18 adopted some or all of the aspects of the merit selection
19 system, and so I think it's just inaccurate to say that we're
20 this terrible outlier.
21 There was a slide that somehow I just passed over that I
22 wanted to conclude that first discussion with, and it was from
23 the American Judicature Society, and it says, quite simply,
24 merit selection is the best way to select the best judges. So
25 in terms of the outlier argument, I don't think it holds water.

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1 The second argument that was advanced by the backers of
2 SJR 3 is that lawyers, who make up four of the seven members of
3 the council, quote, dominate the nonlawyer members. There are
4 simply no facts to support this argument. The idea is there's
5 the three lawyers that the Board of Governors appoints, and then
6 there's the chief, so you have four lawyers. Well, let's look
7 at the facts.
8 Most of the council's votes are unanimous or nearly so.
9 Eighty-one percent, 932 out of 1149 votes taken in the last 30
10 years are either 6-0 or 5-1, and so the idea that any one group
11 has dominant sway over the council seems misleading to me. And
12 I guess I should -- and I didn't put it down, but I probably
13 should have started with the argument that people like Vicki
14 Otte, Tina Williams, Bill Gordon, Elaine -- Eleanor Andrews, you
15 know, are going to be overwhelmed by somebody because that
16 person has a JD after their name is ridiculous on its face, and
17 it's insulting to those people, but --
18 And so that's, I guess, the first argument, that
19 historically there have been councils that have had very, very
20 strong public members or nonattorney members, and the idea that
21 because there's three lawyers and the chief justice they're
22 going to be overwhelmed is ridiculous, but when you look at the
23 numbers, the actual votes, most of the votes are unanimous or
24 near so. Ties of any kind -- and when I say any kind, I mean
25 any three members on one side, mixture of lawyers and

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1 nonlawyers, and any three on the other side, a mixture of
2 nonlawyers and lawyers -- are very rare. Six percent of the
3 time. Ties in which you have what I think of in my mind as a
4 perfect split or an even split, three lawyers on one side and
5 three nonlawyers on the other side, are even more rare. They
6 are extremely rare, about 1.4 percent of the time or 16 out of
7 over 1100 votes since 1984, when they started keeping records
8 that are detailed enough to draw these conclusions.
9 And then going on, in council tie votes the only time that
10 the chief justice votes and the only time that this theory about
11 four versus three, four lawyers and three nonlawyers, can even
12 come into effect, the chief justice usually votes to forward the
13 nominee's name to the governor, in fact, about three-quarters of
14 the time. So, you know, the idea that somehow there's a cabal
15 of lawyers that is keeping qualified people from going to the
16 governor just doesn't add up when you look at the actual
17 numbers.
18 And then, finally, out of those 16 perfect, three lawyers
19 on one side, three nonlawyers on the other side, ties, in about
20 half of them the chief justice voted to send the nominee's name
21 to the governor. So it seems to me that the weight of -- the
22 huge weight of opinion over the last 30 years -- not opinion --
23 of fact over the last 30 years shoots that argument out of the
24 water.
25 Now, recently because the historical facts don't support

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1 their claims supporters of SJR 3 have honed the argument to
2 state that, well, in recent years the chief justices have been
3 faced with attorney versus nonattorney split votes and have
4 sided with the attorneys, thus, dominating the nonlawyers and
5 keeping good people from going on. And, again, I think the
6 facts simply do not support that claim. Since 2010 the Judicial
7 Council has voted 212 times for 25 judicial vacancies. The
8 chief justice voted 10 times, which is right within the
9 historical averages during that time. In fact, it's a little
10 bit less, because historically the CJ is called upon to vote,
11 remember, in about six percent of the cases. In the last five
12 years it's happened in five percent of the cases. So I think
13 this argument simply doesn't hold up.
14 The third argument that's made is that if we increase the
15 number of gubernatorial appointees to the council we would
16 attack the problem of diversity in the judiciary, we would
17 attack the problem of a too narrowly-focused council. Well, the
18 first argument in response to that is SJR 3 does not require
19 demographic, geographical or ideological diversity in the
20 governor's appointments. The council doesn't say anything about
21 that and, in fact, the constitution already says that the
22 governor is supposed to make his or her appointments with due
23 regard to area representation. So the current constitution
24 covers that subject. The proposed change doesn't cover it.
25 Secondly, past governors have appointed minority members

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<p style="text-align: right;">Page 18</p> <p>1 and rural members frequently, but no such appointments have been 2 made for over a decade. So I don't think the problem is in the 3 system. 4 The third argument is giving one person, the governor, the 5 power to name two-thirds of the council would undermine the 6 diversity of ideological views and perspectives. It simply puts 7 too much power in the hands of one person. 8 And, finally, to the extent that the argument is made that 9 there needs to be more diversity on the council, it's to me 10 compelling that the interest groups or the groups in this state 11 that would supposedly be the beneficiaries of that have 12 unanimously, as far as I can tell, come out against it. AFN in 13 its last convention unanimously voted against SJR 3. The ANCSEA 14 corporation CEOs have sent a letter in which it states that all 15 of them oppose SJR 3. The Tanana Chiefs Conference has weighed 16 in as well. And so it just doesn't seem to me that any of those 17 arguments hold up. 18 And, finally, if we've got this right, yeah, the -- if you 19 remember that slide a little bit back, the claim was, well, it's 20 just more democratic to have a broader input into the selection 21 of judges, and I just don't think these claims are 22 substantiated. The current system has a popularly-elected chief 23 executive make the appointment, followed by a retention election 24 three-plus years after the appointment. Our judges in Alaska 25 are subject to the popular will like no other.</p>	<p style="text-align: right;">Page 20</p> <p>1 that the downside here is very high. 2 As Tom Stewart said, "Alaska is fortunate to have the 3 constitutional guarantee of the merit selection -- merit system 4 for the selection of judges. Our merit system has worked well 5 in Alaska. It has produced high quality judges with integrity 6 and abundant skills and it has kept out corrupting political 7 influences that trouble the other states." 8 And, finally, as Fairbanks's own Frank Barr -- I thought 9 it would be nice to end with a local representative -- as he 10 said, "I believe that this Committee report that outlined the 11 system of selection of our judges is just about as perfect as 12 can be. It's not perfect, nothing's perfect, but I think it is 13 a system we want." 14 So with that backdrop as to the issue that we're going to 15 be talking about today, I'd now like to introduce my co- 16 presenter for today's program, someone who literally wrote the 17 book, and there it is, Vic Fischer. Vic grew up and attended 18 school in Berlin, Moscow and New York. He served in the U.S. 19 Army during World War II in France, Germany and the Philippines. 20 In 1950 he moved to Alaska, where he worked in community 21 planning and owned a small cabin on F Street when the Anchorage 22 Bowl looked like -- sorry, that was the military picture -- when 23 the Anchorage Bowl looked like this. That's the cabin that Vic 24 lived in. 25 During the push for Alaska statehood he was elected as an</p>
<p style="text-align: right;">Page 19</p> <p>1 I mean, I think we take second place to no one in the 2 argument as to whether or not the Alaska electorate has a chance 3 to be heard on who should be their judges, and is better 4 informed or has the possibility of being better informed through 5 the work that the Judicial Council does and puts on their 6 website about the votes that they are about to cast than anyone 7 in the world -- or as well informed, I think better informed, 8 than anyone else in the world. So I don't think that argument 9 has a lot of traction to begin with. 10 But continuing on, and taking on the question of 11 legislative confirmation, as George McLaughlin, again, the chair 12 of the committee on the judiciary, said when this issue came up, 13 and it was pretty hotly debated, he said, "If you require a 14 confirmation of your attorney members by the legislature you can 15 promptly see what will happen. No longer is the question based 16 solely on the qualification of the candidate for the bench. If 17 political correctness enters into the determination of the 18 selection of those professional members who are to be placed 19 upon the judicial council, the whole system goes out the window. 20 All you have is one other political method of selection by [sic] 21 your judges." 22 And I think that's right. I guess the really interesting 23 thing about that quote to me was that the term "political 24 correctness" was in use in 1955. I thought that was kind of a 25 recent thing. Who knew? But I think the point is well stated,</p>	<p style="text-align: right;">Page 21</p> <p>1 Anchorage delegate to the Alaska Constitutional Convention which 2 took place at the University of Alaska Fairbanks from November 3 1955 to February 1956. He was among the youngest delegates and 4 is seen here speaking during the convention debates. That's Vic 5 over -- way to the left of that. And another picture of him 6 that's a little bit better, speaking during the debates. 7 On February 6th, 1956 he was one of the 54 delegates from 8 across the state to sign the final convention document. I have 9 to say that I ran this introduction past Vic and it originally 10 said 55, and he said, well, only 54 of us -- and I knew this, 11 I'd forgotten it -- only 54 of us signed it that day. One of 12 the delegates from Juneau didn't sign it until a substantial 13 period of time later, so he was one of the 54 on that day, 14 although they all eventually signed it -- which was approved by 15 Alaskan voters later that year by a margin of two-to-one. 16 In the many years since Vic Fischer has been a dedicated 17 public servant, serving in the Alaska Legislature and as 18 founding director of the University of Alaska's Institute of 19 Social & Economic Research. He has worked tirelessly to support 20 and defend our constitution and to explain to Alaskans the goals 21 and the objectives of our state's founders. He has chronicled 22 his amazing life in the recent memoir, "To Russia With Love." 23 In 2002 Vic spoke with other surviving delegates to our 24 Constitutional Convention at a Bar Historian's Luncheon to 25 commemorate our founding document. You will notice on the far</p>

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1 right of this photo another convention delegate who also played
2 a key role in our state's founding and who we had hoped would be
3 here today, and that's Jack Coghill, but, unfortunately, he's
4 not able to be here. He was another young delegate to the
5 Constitutional Convention who has devoted much of his life to
6 public service, and his legacy continues today through the
7 service of his son, Senator John Coghill, who currently serves
8 in the legislature and who, again, we also thought would be
9 here, but apparently his duties have kept him in Juneau this
10 week.

11 To our knowledge Vic Fischer, Jack Coghill and Retired
12 Superior Court Judge Seaborn Buckalew, pictured here at the 2005
13 Bar Convention -- Bar Historian's Luncheon, excuse me, are the
14 only surviving delegates of our Constitutional Convention. We
15 are so grateful for their legacy, and we live with the benefit
16 of their vision every day.

17 And now I would like to invite my co-presenter to the
18 stage. Please join me in welcoming Vic Fischer.

19 (Applause)

20 **MR. FISCHER:** Thank you.

21 **JUSTICE CARPENETI:** Well, you can't imagine the stress of,
22 A, having to appear on a stage with Vic Fischer, and B, having
23 to manipulate a PowerPoint, so one out of two so far.

24 (Laughter)

25 **JUSTICE CARPENETI:** Is the mic on? Okay, thank you. I

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1 relaxed too soon over the technical issues.

2 Vic, I'd like to, first of all, thank you for agreeing to
3 do this. It's an incredible thrill and honor and privilege, I
4 think for all of us, to be able to put some questions to you and
5 to hear the inside story of the Constitutional Convention, and
6 just be with you today.

7 **MR. FISCHER:** Thank you, Bud. I'm delighted to be here.
8 I see a lot of friends. I see a lot of people I've admired for
9 many, many decades, and it's a real honor and real pleasure to
10 be here, especially sharing the -- this table with Bud
11 Carpeneti.

12 **JUSTICE CARPENETI:** Well, thank you very much. Let me
13 start the questioning period by trying to go to the
14 pre-convention era -- I don't mean necessarily decades, but
15 before the convention. Let me just ask -- let me ask some
16 basic -- how old were you? You were one of the younger ones,
17 but how old were you?

18 **MR. FISCHER:** I was 31. Jack Coghill was 30. Tommy
19 Harris from Valdez was 29, so I was the third youngest.

20 **JUSTICE CARPENETI:** Wow. And at that time what were you
21 doing in terms of an occupation?

22 **MR. FISCHER:** I was unemployed. No, I had been planning
23 director for the City of Anchorage and just about this time 60
24 years ago I resigned that position so I was completely free to
25 run for the Constitutional Convention.

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1 **JUSTICE CARPENETI:** And your background was you'd grown up
2 in these exotic places, but come to this country as a younger
3 person and then gone to school here, and you were out of the
4 army, obviously, and what were the circumstances of coming to
5 Alaska?

6 **MR. FISCHER:** Oh, it was just a dream when I was going
7 overseas and in an army transport across the Atlantic Ocean, I
8 was thinking about where I want to alight after the war,
9 assuming I came out of it, and I started reading books of the
10 states and the further west I got the more I liked going west,
11 and having been 10 of my first 15 years in Russia where my
12 father was an American correspondent I was interested in north,
13 and there was Alaska. And so when I got out of the army I wrote
14 to the University of Alaska, asked if they had a course in
15 architecture, which I saw as the foundation for city planning,
16 which was the profession I wanted to pursue, but they had mining
17 and English and agriculture and stuff like that. So I went back
18 to Wisconsin, finished Wisconsin and went on to graduate school,
19 got a planning degree and, lo and behold, the first professional
20 planning job opened up, and it was in Alaska, that I grabbed and
21 here I am.

22 **JUSTICE CARPENETI:** Okay, so you're 31 years old, you're a
23 young planner, and the Constitutional Convention is put on the
24 docket. What made you decide to run for a delegate?

25 **MR. FISCHER:** I was one of a lot of young veterans and

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1 some older people, but mostly young, who were active in a group
2 called Operation Statehood, and it was a citizen group to help
3 promote statehood, and we had lots of activities. Barry White
4 was the president of Operation Statehood, I was the vice
5 president, and it was a matter of working for our civil rights,
6 because we could not vote for president. We could not vote for
7 U.S. senator. We were completely dominated by bureaucrats from
8 Washington, D.C., and people who talk about federal overreach
9 should have lived in Alaska during territorial days.

10 (Applause)

11 **JUSTICE CARPENETI:** So I wanted to ask you about the
12 atmosphere regarding the possibility of statehood and you've,
13 obviously, started to talk about that. What was it like, what
14 did it feel like being in Alaska then?

15 **MR. FISCHER:** Most Alaskans were for statehood. It was a
16 strong movement, it was totally bipartisan, and it was just sort
17 of a universal drive, but each year, each Congress, it seemed
18 that just as things started to happen, just as one committee
19 approved statehood in the House, the Rules Committee of the
20 House killed it, the Senate might move and it was killed, and
21 each time -- it was very frustrating, and in 1954 Congress
22 adjourned and still hadn't done anything about statehood, even
23 though it seemed closer than ever, and that's when the decision
24 was made, let's write a constitution. We were running parallel
25 with Hawaii, which wanted statehood. They already had a

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<p style="text-align: right;">Page 26</p> <p>1 constitution. We wanted to prove that we're mature enough to 2 become a state. We knew what we were about, and we will prove 3 that we can write the best constitution in the United States. 4 JUSTICE CARPENETI: Let me ask you, when you were thinking 5 about writing a constitution and saying we could write the best 6 constitution in the United States was there any particular 7 thought at that time as to the kind of judiciary that you wanted 8 or was it more generalized towards the idea of we can prove that 9 we can govern ourselves? 10 MR. FISCHER: Well, I would say the basic idea was we 11 can -- we'll demonstrate, just that the Constitutional 12 Convention, writing a constitution was an active state -- step 13 towards statehood, and those of us who were sort on the active 14 front lines saw the constitution as a step towards statehood. 15 It was really after we came to Fairbanks, after we arrived here 16 and the reality sank in that we are writing a constitution for 17 the future State of Alaska, that we really got down to the -- 18 that became the overriding purpose, that -- statehood was always 19 in the background, but it was really looking to do the best 20 possible job for future generations of Alaskans. 21 Judiciary was one of the fundamental parts of a 22 constitution. There was very strong belief that the three 23 branches of government should be effective. This was very 24 important because we had been a colony of the United States. We 25 had no say in the judiciary. We had a territorial legislature</p>	<p style="text-align: right;">Page 28</p> <p>1 us contemplated. I mean, we had seen it, for better or for 2 worse, that's part of the federal system, but one of the things 3 that we did in the judicial committee, in all of the committees 4 working on the different parts of the constitution, was to see 5 what other states had done, what their experience was. More 6 than anything, we learned what not to do. Occasionally there 7 were examples that were moving in a direction that was closer to 8 what modern thinking was, what -- where the leaders and whatever 9 subject matter was under consideration, what the constructive, 10 contemporary thinking was about what should be -- might be 11 considered by the Constitutional Convention, and so the 12 Judiciary Article was very much like other articles. It fell 13 into place in some ways far easier than local government 14 structure, where we could learn nothing from other states except 15 what was -- what we should not do. Resources was very difficult 16 to put together because we dealt with a full gamut of resources 17 rather than just grazing or water rights or mining and -- 18 JUSTICE CARPENETI: Let me *6:45 -- 19 MR. FISCHER: Stop. 20 JUSTICE CARPENETI: Let me follow up on -- you said 21 appointment for life was something that had no currency. What 22 about other models, full partisan elections, was that discussed 23 in the debates? 24 MR. FISCHER: The only alternative to what we have in the 25 constitution today, was considered by the convention, was a</p>
<p style="text-align: right;">Page 27</p> <p>1 that was totally ineffective. We had a governor appointed by 2 the President of the United States. We wanted to have a system 3 that was strong, where responsibility was fixed and each branch 4 was effective and independent, and when it came to the judiciary 5 it was to be parallel with a strong executive branch headed by a 6 single elected chief executive, to have a legislature that was 7 effective and streamlined, and to have an independent judiciary, 8 one that was independent of the executive branch and independent 9 of the legislature, and I think that is essentially what we 10 tried and, obviously, the judiciary has over the decades since 11 statehood performed more effectively than the legislature and 12 the executive put together. 13 (Applause) 14 JUSTICE CARPENETI: I did not know what Vic Fischer was 15 going to say that. I just want to -- 16 (Laughter) 17 JUSTICE CARPENETI: Let me ask you in terms of the 18 considerations that you dealt with in structuring the judiciary, 19 first, did the territorial experience with the federal courts 20 under the territory of Alaska shape the views of the delegates 21 in terms of putting together a judiciary system? 22 MR. FISCHER: Certainly we were all familiar with a 23 federal system, which essentially was run from Washington, D.C., 24 and we wanted to have our own system, but also we saw that 25 lifetime appointment was not something that anyone -- any one of</p>	<p style="text-align: right;">Page 29</p> <p>1 straightforward partisan election system, and that came up on 2 the floor of the convention. I don't think the judiciary 3 committee seriously discussed that or considered -- they may 4 have discussed it, but they -- I don't think they seriously 5 considered it, but it was brought up by Fairbanks delegate 6 Robert McNealy, an attorney, who argued vehemently that to have 7 a democratically elected judiciary, judges and justices, would 8 protect us from political influence and corruption, and we had 9 serious discussion. 10 There was voted -- and the first time it came up, was 11 voted down by I think something like 52 in favor of the merit 12 system that was proposed by the committee, with only two votes 13 for the election process. It -- the -- this was in second 14 reading, and in third reading, the final adoption of the 15 article, Bob McNealy brought it up again. We had another 16 discussion, another round, and again overwhelmingly defeated the 17 idea of elected judges, and so there was never any question 18 about the makeup of the Judicial Council or any question about 19 the concept of the Judicial Council. 20 JUSTICE CARPENETI: Let me interrupt you there and ask you 21 kind of a pointed question about the debate that's going on now, 22 which is that the bar, which has been sometimes referred to as 23 an elite guild, has way too much say in the appointment of 24 judges under the system and that's why the governor should be 25 given twice as many appointments, and I guess the general</p>

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1 question is why the role for the Bar Association that the
2 framers chose, equal with the governor's appointing of three
3 members.
4 **MR. FISCHER:** As I mentioned, the idea was that we want an
5 independent judiciary, we wanted the best qualified people to
6 rise up to judgeships and justices, and one way of getting there
7 was to get the people who have to work in the judicial sphere
8 who best would know the candidates or applicants for judgeships
9 and have to work with them, have those people be part of the
10 process. Well, the idea was if we let the governor decide which
11 lawyers should be on the Judicial Council, you right off the bat
12 have a -- you have politics coming into it. The Bar
13 Association, the organized bar of the state, was the vehicle to
14 get the appointments of the best qualified attorney members for
15 the council. So, again, there was no dispute about that, having
16 the Bar Association be the vehicle.
17 **JUSTICE CARPENETI:** What about the chief justice's role,
18 the tie-breaking role, which as we've seen in those votes
19 happens pretty infrequently? What was the thinking behind
20 creating the chief as --
21 **MR. FISCHER:** Let me ask you. I looked at the
22 constitution. It doesn't say that the chief justice votes only
23 in case of tie.
24 **JUSTICE CARPENETI:** That's true.
25 **MR. FISCHER:** That must be by rule of the courts. So far

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1 as I'm concerned, chief justice is free -- under the
2 constitution is free to vote in all cases --
3 **JUSTICE CARPENETI:** Oh, my gosh.
4 **MR. FISCHER:** -- so there was no --
5 (Laughter)
6 **MR. FISCHER:** There was no feeling that having four
7 attorneys would overwhelm the nonattorney members. That's it.
8 So the attack on chief justice being biased or something is just
9 ridiculous.
10 **JUSTICE CARPENETI:** So I take it that you'd have a similar
11 answer to the notion that it's a conflict of interest for the
12 chief justice to vote on -- in tie situations where the supreme
13 court is at stake.
14 **MR. FISCHER:** Well, I have seen the chief justices since
15 the, you might say, beginning of time, but I think we have had
16 most phenomenal chief justices, and the chief justice is the
17 chief administrator of the court system. That chief justice has
18 probably more of a vested interest in finding the best people to
19 be judges than anybody else in the state. So I would say, right
20 on, get the chief justice right out front of that.
21 (Applause)
22 **MR. FISCHER:** But I'm sorry if I'm treading on dangerous
23 territory.
24 **JUSTICE CARPENETI:** No, no, the only thing dangerous about
25 this interview is asking a question and looking really foolish

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1 when Vic Fischer says, "That's not what we said." We'll come
2 back to that later.
3 And I see that we're close to running out of time, but I
4 did want to ask this question. In your book, "Alaska's
5 Constitutional Convention," you quoted consultants to the
6 convention who were somewhat critical of the Judiciary Article,
7 and some of the folks supporting SJR 3 have seized on this
8 quote, which basically says Article IV goes a long way towards
9 withdrawing the Judicial Council from popular control and
10 turning it over to the Bar Association, and you also note that
11 that criticism at the time didn't carry much weight with the
12 framers, that it didn't even make it to the floor, and that the
13 Judiciary Article was approved practically unanimously, but I'd
14 like to know, what was your reaction to that criticism in 1955
15 and how do you feel about it now?
16 **MR. FISCHER:** Well, those -- I was very close to the
17 consultants because I'd worked in the municipal arena before the
18 convention and I had worked with them nationally, and so they
19 brought that criticism to me, and I told them the convention has
20 already overwhelmingly decided this is the way to keep the
21 judiciary system away from politics, away from control by the
22 executive or the legislative branches, and that this was already
23 a compromise and that the retention elections provided the
24 democratic controls necessary, and I think the retention system
25 has worked extremely well because it's not just the lawyers and

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1 laypeople on a judicial council who are involved in recommending
2 retention or not. There's a whole process of law enforcement
3 people, jurors and others being queried about judges who are up
4 for retention.
5 So we have a broad system in place that wasn't anticipated
6 and -- but, anyway, I -- Bill Egan, who was not an attorney,
7 told the consultants they can put a memo together, but the
8 committee of chairmen, we had 18 committee chairmen of -- or 15,
9 only about one-third of them were lawyers, and they rejected
10 any -- doing anything about the criticism. It's totally
11 irrelevant. We have a good democratic underpinning for the
12 judicial system through the process that we have.
13 **JUSTICE CARPENETI:** Okay, thanks. Let me -- boy, time
14 flies when you're having fun. I -- I'm going to wrap this up.
15 I'm going to skip over a lot of things that I'd hoped to ask you
16 because we wanted to leave a minute or two for questions from
17 the floor, but ask you this wrap-up question. With the
18 perspective of 60 years' of experience for Alaska's grand
19 experiment, how do you rate the performance of Article IV? Is
20 there something you'd do differently or are you happy with it?
21 **MR. FISCHER:** Yeah, I'm totally happy. I -- as I was
22 chatting with Bob Coats, the one criticism I have is the age 70
23 retirement requirement, and I want you to know that that seemed
24 very reasonable when I was 31 years of age.
25 (Laughter and applause)

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<p style="text-align: right;">Page 34</p> <p>1 JUSTICE CARPENETI: Well, let me thank you for coming here 2 today and sharing your wisdom with us. I -- and I'm looking for 3 Jeff. Can we open it for a few minutes of questions or -- okay. 4 If there are questions of Vic as to -- yes, Mike Wolverton. 5 MR. WOLVERTON: You know, I have more of a question for 6 the group of judges who are sitting or retired judges here. I 7 wonder how many are like me. I would never, have ever run in 8 the political system for a judgeship, not in a million years 9 (indiscernible). I wonder how many people (indiscernible) are 10 in that group. (Indiscernible). 11 (Laughter) 12 JUSTICE CARPENETI: Thank you. Any other tough questions 13 for Vic? 14 MR. FISCHER: Well, but let me put it to you. You have 15 been chief justice and a whole -- had a whole career in our 16 judicial system. I think your bias has come through, but would 17 you do a wrap-up of have you seen any politics getting into the 18 selection of judges? Have you seen any corruptive influences or 19 to what extent have there been problems with the system that 20 call for any kind of changes in the article? 21 JUSTICE CARPENETI: Well, I'd have to say that I think the 22 system really demands a lot of the people that are in it and I 23 think it brings out the best of the people that are in it, and I 24 mean that in the sense that you don't decide to try to become a 25 judge unless you're willing to just kind of put your life on</p>	<p style="text-align: right;">Page 36</p> <p>1 apply the facts of the law, and then you go on. 2 And so it's a big responsibility, but it's, I think -- I 3 mean, I really agree with Jay Rabinowitz's statement that the 4 framers created a gem when they put the -- put Article IV 5 together, and the perfect balance between merit and appropriate 6 political input I think is brilliant, and I think it's given us 7 a judiciary where you don't walk into a courtroom and say, now, 8 how much did this one contribute to my campaign and how much did 9 this one contribute to my opponent's campaign, and, you know, 10 three years at going to conference of chief justices I met a lot 11 of chief justices from other states and I never heard anyone say 12 anything other than you guys have a great system, and I think 13 it's because of you, Vic, and your colleagues in 1955, and I 14 think we all should be incredibly grateful for it, and I am. 15 (End of recording) 16 / 17 / 18 / 19 / 20 / 21 / 22 / 23 / 24 / 25 /</p>
<p style="text-align: right;">Page 35</p> <p>1 hold for six or eight months, expose yourself in a lot of ways 2 to everything. It's a tough process, the bar poll, and -- but 3 you have the sense that you're getting a fair hearing from 4 people that really want to make sure that the bench is a good 5 bench, and that's the merit phase. And then you have the 6 political phase, which is perfectly appropriate in that the 7 governor, who's the elected representative of the people, makes 8 the final choice, and then the vote -- 9 You know, like every other judge, when the retention 10 election's coming up I'm kind of thinking, oh, what have I done 11 wrong or, you know, how are the voters going to see this case or 12 that case, but it's -- it demands the -- of the people that do 13 it that they be willing to kind of make an open book, and then 14 once you're in the system you have the freedom and the luxury 15 and the responsibility of making the best decision that you can 16 make on that case according to what the law requires, and that 17 is -- you know, I don't think I had a day in my life as a judge 18 that I didn't make some decision that if I hadn't been in 19 another kind of system I would have done it differently. I 20 mean, judges all the time are applying laws that they would not 21 have written that way or that maybe are a little too tough in 22 one regard or they're too lenient in another regard, but you 23 have the luxury of knowing that you take that out of it, what 24 you do is try to figure out what the legislature was saying or 25 what the constitutional framers meant, get the facts straight,</p>	

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