



THE STATE
of **ALASKA**
GOVERNOR BILL WALKER

Department of Law

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April 11, 2016

Via E-Mail:

Senator.Bill.Stoltze@akleg.gov

Re: HB 126

Dear Senator Stoltze:

The Department of Law has reviewed the correspondence from Staff Judge Advocate Matthew Prieksat, and we do not share his concerns regarding the constitutionality of the proposed Military Justice Code for Alaska, HB 126. Mr. Prieksat raises several issues, including those that touch on the Alaska Constitution. He states the proposed UCMJ is inconsistent in that it includes grand jury requirement and unanimous verdict requirement, but not 12/6 jurors requirement.

The main constitutional concerns come from the interplay between Section 8 and Section 11 of Article 1 of the Alaska Constitution. Section 8 provides, in relevant part, that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the armed forces in time of war or public danger." Section 11 states that "in all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve..." These provisions mirror the Fifth and Sixth Amendments to the United States Constitution. The Fifth Amendment provides that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger. The Sixth guarantees the right to trial by jury. The United States Supreme Court has long held that the right to trial by jury is limited to those persons who are subject to indictment or presentment under the Fifth amendment. Therefore, in a case arising in the land or naval forces, or in the militia when in actual service in times of war or public danger, the accused is not entitled to a jury trial. *Ex Parte Milligan*, 71 U.S. [4 Wall.] 2, 123, 18 L.Ed. 281 (1866).

In *Johnson v. Sayre*, 158 US 114 (1895) the Court held that in the Fifth amendment the modifier "when in actual service in time of war or public danger" is added to the militia (but not the land or naval forces) because that is the only time that the militia are under the control or jurisdiction of the government. In contrast, the Army and

Navy are always in the service of the government. *See Also Alabama Great S.R. Co. v. United States*, 49 Ct.Cl. 522, 534-35 (1914). Because this interpretation of the federal language long predates the Alaska Constitution, the Alaska Constitution must be read with this history in mind. Therefore, the Department of Law believes that exception to the grand jury requirement in Article 1 § 8 of the Alaska Constitution should be read to apply to any person who is actually serving on active duty with the Guard, because that person is under the control and jurisdiction of the Alaska government.

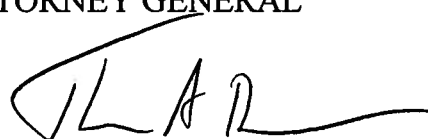
HB 126 will most likely pass constitutional muster. Mr. Prieksat recommends making things constitutionally "consistent" by including a grand jury requirement, removing the preliminary hearing, increasing the number of jurors to 8 and requiring a unanimous verdict. Because the grand jury and jury requirements of the Alaska Constitution do not apply, there is no lack of constitutional consistency. If they did apply, their exact terms and requirements must be met, including the requirement that a unanimous verdict by a jury of 12 is required for conviction. But, because these provisions do not apply in the military context, the exact composition of the jury and the grand jury and preliminary hearing procedures can be established in statute, as long as basic due process requirements are met. And, HB 126 provides much more than the minimum due process.

While the courts will be the ultimate arbiters of constitutionality, we believe that if challenged, HB 126 will be found to be fully compliant with both the United States and Alaska Constitutions.

Sincerely,

CRAIG W. RICHARDS
ATTORNEY GENERAL

By:

A handwritten signature in black ink, appearing to read 'TAD', with a long horizontal flourish extending to the right.

Thomas Dosik
Assistant Attorney General

TAD/aec