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ALASKA'S CONSTITUTIONAL CONVENTION

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presented to him by the judicial council, which is composed of three laymen appointed by the governor with the consent of the legislature; three attorneys named by the organized state bar; and the chief justice, who serves as chairman. Three years after his first appointment, a judge must submit his name to the voters of the state or of his district for approval or rejection. Once approved, a superior court judge goes before the voters for reconfirmation every seven years, and a supreme court justice stand for popular approval every ten years. The purpose of this provision is to make judges responsible to the people without subjecting them to partisan politics or competitive campaigns for election or re-election.

With respect to retirement of judges, attorney members of the committee R.E. Robertson of Juneau, seventy, and Warren Taylor of Fairbanks, sixty-four, strongly dissented from the proposal to set the retirement age for judges at seventy. They felt that ability to serve does not necessarily end at age seventy and that those reaching this age should "not be put in mothballs." A committee compromise was finally reached according to which judges would retire at age seventy but could be given special judicial assignments thereafter.⁷⁹

Once the committee agreed on the proposed article, committee chairman McLaughlin sent letters to the presidents of the Alaska Bar Association and local bar associations, district judges, the U.S. attorney, and the U.S. Commissioner in Alaska, and to others in and out of the territory, asking for their comments on the draft. As a consequence, many endorsements of the proposal were obtained, including action by the board of governors of the Alaska Bar Association, which met in Fairbanks during the time the judiciary article was before the convention. The board agreed to support the article as recommended by the committee, and members of the board of governors appeared before the judiciary committee and spoke in behalf of the proposal with individual delegates.

The proposed judiciary article was considered in plenary session on December 9, one month and one day after the convention began. A number of amendments were considered in second reading, dealing with such issues as the responsibility for drawing judicial district boundaries, selection of the judicial council, and qualification of judges.

The committee proposal required supreme court and superior court judges to have been admitted to practice law in Alaska at least five years prior to their appointment and to have been residents of the state for the same period. In line with general opposition to

⁷⁹*Anchorage Daily Times*, 6 December 1955.

that laid the basis for a strong and independent judiciary.⁸⁵ While they concurred with the basic objectives, the consultants stated that:

These sections in particular, however, go a long way toward withdrawing the judicial branch from the control of the people of this state and placing it under that of the organized bar. No state constitution has ever gone this far in placing one of the three coordinate branches of the government beyond the reach of democratic controls. We feel that in its desire to preserve the integrity of the courts, the convention has gone farther than is necessary or safe in putting them in the hands of a private professional group, however, public-spirited its members may be.

The consultants then suggested a number of revisions that would, in their view, democratize the proposed system by providing for legislative confirmation of attorney members of the judicial council, adding a superior court judge and another lay member to the membership of the council, and other changes. However, the suggestions were not accepted by the meeting of committee chairmen and never reached the convention floor.

Local Government⁸⁶

In providing for the legislative, executive, and judicial branches of government, delegates dealt with subject matter with which they were familiar and on which they had definite opinions. On the other hand, local government was a subject for which there was little Alaska experience to provide a useful point of departure and which provided few useful models. The local government committee, therefore, determined early that innovation was the key to structuring a local government system for Alaska.

Under territorial status, local institutions had undergone only limited development; there was little self-determination at the territorial and even less at the local level. Federal law prescribed the powers of the territorial legislature, severely limiting the scope and types of local government and restricting the powers that could be exercised by cities. For example, counties could not be established, bonding criteria were strictly delimited, and home rule could not be extended to cities.

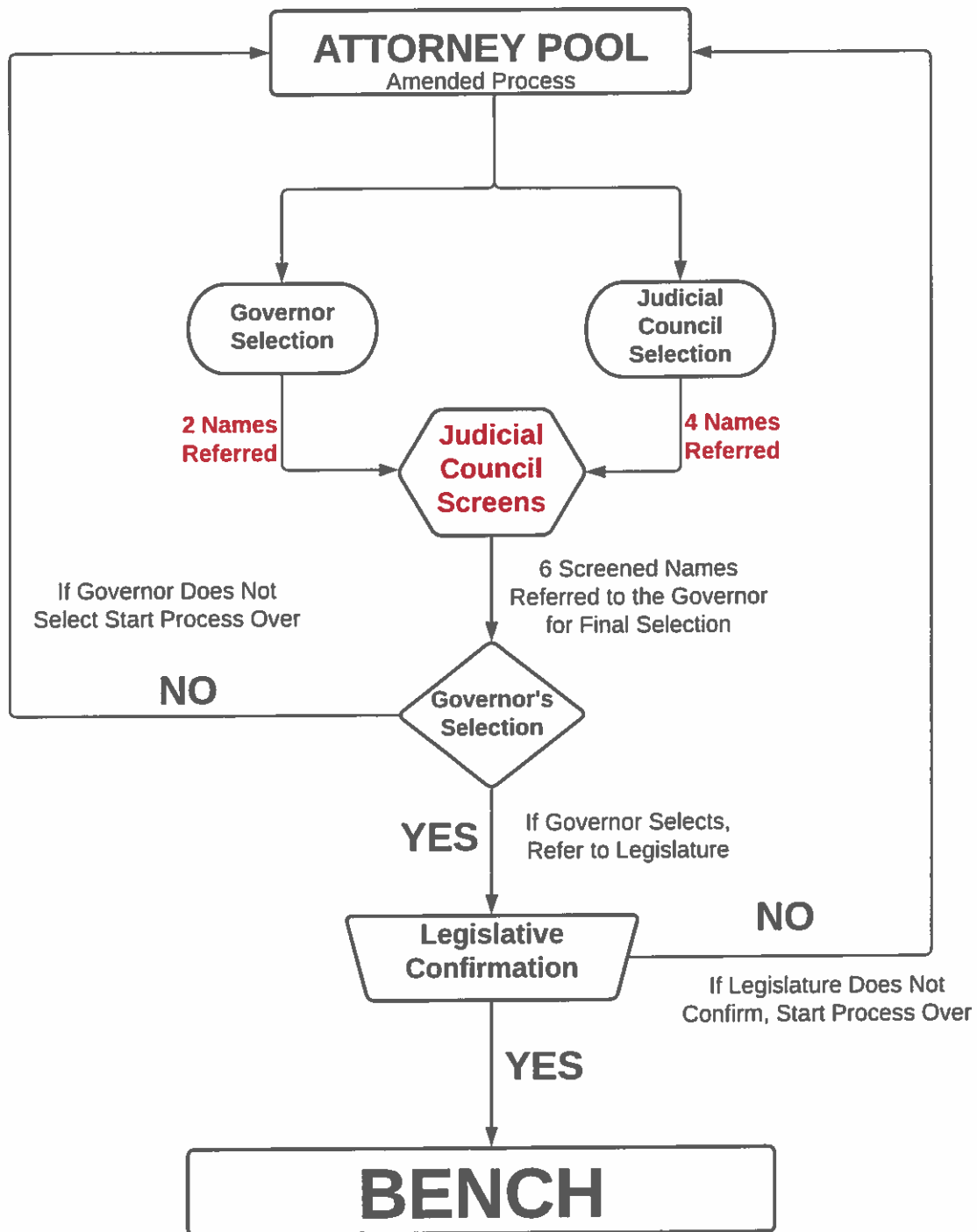
A New Local Government System

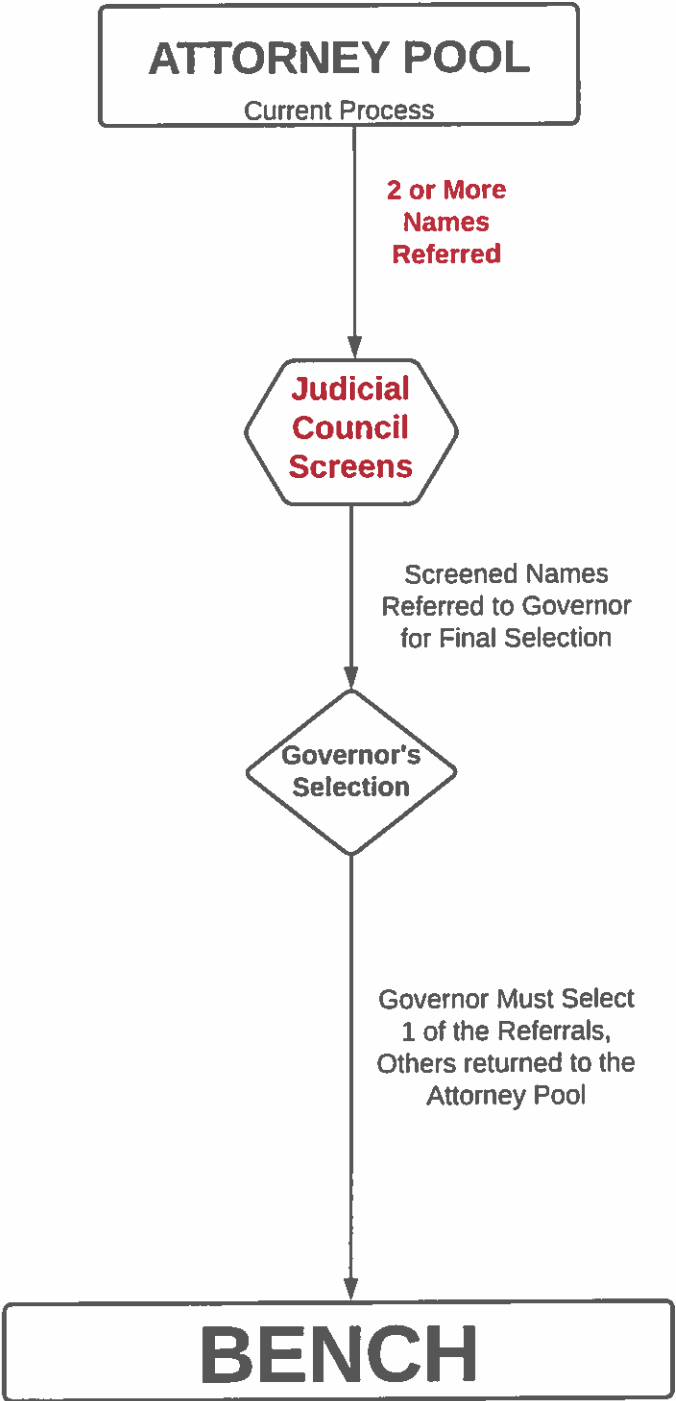
Study of the PAS staff paper⁸⁷ and a review of local govern-

⁸⁵See Chapter 3, pg. 42.

⁸⁶For more information on this topic, see the author's chapter "The Constitution Framework" in Thomas A. Morehouse and Victor Fischer, *Borough Government in Alaska*, pp. 33-65.

⁸⁷Public Administration Service, *Constitutional Studies*, Chapter VIII.





BUILDING A STATE JUDICIARY

Mildred R. Hermann*

The fact that Alaska has been able to build a judiciary widely heralded as the best among the fifty states perhaps stems from its chaotic youth. With no territorial judiciary it had nothing to undo, and there was no necessity for compromise. It could build its judiciary without reconciling practices of an already existing judiciary.

I. CONSTITUTIONAL PROVISIONS

The first step toward this Alaskan objective was taken at the constitutional convention which convened in the late fall of 1955 to draft a state constitution. This was almost three years before Statehood was achieved. Article IV of this constitution set up the guide-lines for the legislative action that later gave Alaska its model judiciary. It was characteristic of the delegates that they strove mightily, and for the most part successfully, to keep statutory law entirely out of the constitution. Wisely, they determined that their function was to establish the framework within which future legislatures could pass the laws which were needed by the state. The judiciary article is an excellent example of this policy.

First, the delegates decided that judgeships should be appointive rather than elective. Appointive, however, not at the will of the executive department, which, presumably, had political debts to pay, but at the will of the people, whose interest in the courts was not political. To assure that end, they created a judicial council consisting of three laymen, appointed by the Governor and confirmed by the legislature, and three attorneys selected by the Alaska Bar Association. It provided that the chief justice would serve as an ex-officio member and chairman of the council. The council, along with other prescribed functions, served as a nominating committee, and was required to name not less than two candidates for each initial judgeship to be filled. It was from the names submitted by the council that the Governor was required to make his appointments. Vacancies are filled in the same way.

However, under the judiciary article, each judge appointed serves on a probationary basis. His appointive term runs only

* Admitted Alaska Bar 1934; Active practice at Juneau since admission; Secretary Alaska Statehood Committee 1949-1959; Delegate to and President pro tem of Alaska Constitutional Convention 1955-1956; member of Style and Drafting Rules Committee.

until the first general election held more than three years after his appointment. At that time he must stand for election, not against another candidate, but on his own record as a judge. If the voters find that record satisfactory, a superior court judge gets a six year term of office and a supreme court justice a ten year term. He must again stand for approval or rejection by the electorate at the end of his elective term.

Provision is also made for the retirement of judges for incapacity or at age seventy they are required to retire. Impeachment for malfeasance or misfeasance in the performance of official duties is also provided for, but whatever the cause for an existing vacancy, appointment must be made from nominations made by the judicial council, operating under rules established by itself.

In addition to its appellate functions which follow the customary state pattern, rule making is vested in the supreme court. However, there is a legislative check on this power by a provision that rules may be changed by the legislature by a two-thirds vote of each house. The chief justice of the supreme court is the administrative head of all the courts, and has the power of assigning judges from one superior court to another for temporary service. He also, with the approval of the supreme court, appoints an administrative director to supervise administrative operations of the entire judicial system.

Thus it may be seen that Alaska, in setting up the framework for a judicial system, has been guided by two basic considerations. First, it has created an integrated and unified court system with the lines of authority clearly drawn. A strong supreme court insures good administration of the entire system as well as procedural uniformity in the superior court and courts of lesser jurisdiction. Second, it has established a system of restraints on the power of judges, by the creation of the judicial council and the requirement that judges must run to succeed themselves on the basis of their records.

The judiciary article of the constitution has the traditional checks and balances of the American pattern of government. The executive branch, which has the appointive power, is checked by the judicial council which makes the nominations and by the legislature which confirms the appointment of the council's lay members. The judicial system has a further check from the fact that the legislature may, by a two thirds vote, abrogate any rule established by the supreme court.

The delegates to the constitutional convention properly left for legislative action such matters as the salaries of judges, the

creation of inferior courts to replace the old United States Commissioner's Courts, the appointment or election of prosecuting attorneys, the number of judicial districts to be established, and numerous other matters that belong in the realm of more flexible legislative enactments rather than under rigid constitutional requirements.

II. LEGISLATIVE ACTS.

To observe how the legislature has met the challenge of the constitutional provisions of the judiciary article, it is necessary now to turn to the judiciary acts passed by the first state legislature which met in January, 1959. This legislation is embodied in three separate acts. The first sets up the supreme and superior courts and defines their jurisdiction and functions. The second, an act amendatory to the first, was made necessary by a decision of the United States Court of Appeals for the Ninth Circuit, and the Attorney General of the United States ruling that the court of appeals could have no jurisdiction over appeals from the Alaska courts. The third, created the magistrates courts and described their functions.

A. SUPREME COURT

Chapter 50 of the 1959 state legislature covers the organization of the supreme court and the superior court system as provided in Article IV of the constitution. The supreme court consists of three justices, including the chief justice, and is vested with all powers and authority necessary to carry into complete execution all its judgments, decrees and determinations on all matters within its jurisdictions, according to the constitution, the laws of the state and the common law. Sessions of the court shall always be open for the transaction of business in the manner determined by rule of the courts; the sessions being fixed at times and places by court rule.

The qualifications of justices, include American citizenship, three years residence in Alaska immediately prior to appointment, eight years active practice of law immediately preceding appointment, and a license to practice law in Alaska. Active practice of law is defined as sitting as a judge in a state or territorial court; actually engaged in advising and representing clients in matters of law; rendering legal services to any agency, branch or department of government or any state or territory thereof, in an elective, appointive or employed capacity; and serving as a professor, associate professor or assistant professor in a law school accredited by the American Bar Association.

Vacancies, including initial appointments, are required to be filled by appointment within 45 days after the judicial council has presented names of nominees to the Governor.

Supreme court justices are required to take such oaths of office as may be prescribed by law, and to stand for rejection or approval as provided by the constitution, on the basis of their records as justices. They may be retired for incapacity, or impeached for incompetence, malfeasance or misfeasance in the discharge of their official duties, and during their terms of office may not practice law, hold office in a political party or hold any other office or position of profit under the United States, the state or its political subdivisions.

The annual compensation of the chief justice is fixed at \$23,500 payable monthly in twelve equal installments. Associate justices will receive \$22,500. Compensation shall not be diminished during the term of office, except by general law applicable to all salaried officers in the state. Salary for each month is paid contingent upon affidavit that no matter referred to the justice for a period of more than six months for an opinion or decision is incomplete or undecided by him. The appointment of an administrative director to supervise the administrative operations of the entire judicial system is provided for.

B. SUPERIOR COURTS

Since Alaska decided against the archaic county system of government prevailing throughout the "South 48," it was necessary to create courts having functions and jurisdiction similar to those of county courts. This was effected by the creation of the superior court system, which sets up a single district court for all Alaska. The constitution provided that five branches of the district court be created, but gave the legislature power to increase the number if necessary. The legislature decided that 8 courts were necessary and so provided by statute. The superior court is the trial court and in addition to original jurisdiction in all major civil and criminal matters, its jurisdiction specifically includes probate and guardianship of minors and incompetents, functions heretofore discharged by the United States Commissioner's Courts. The superior court also constitutes an appeal court for courts of inferior jurisdiction or any administrative agency when such appeal is provided by law, and its right to issue writs of various types is precisely outlined.

The jurisdiction of the superior court extends to the entire state, though real property actions must be commenced in the district in which the real property is situated. Change of venue from

one district to another is granted for the purpose of assuring an impartial trial, where the convenience of witnesses and the promotion of justice requires the change or when the court finds the defendant will be put to unnecessary expense and inconvenience. In cases where the presiding judge may be disqualified, a judge from another district may be assigned to try the action and no change of venue ordered.

Qualifications for superior court judges are slightly less rigid than for supreme court justices. Only five years of practice immediately preceding appointment is required but the requirements of American citizenship and residence in Alaska are the same. Like wise all superior court judges must be licensed to practice law in Alaska.

Vacancies are filled in the same manner as provided for justices of the supreme court and each judge is required to run for approval or rejection by the electorate at regular term intervals. If rejected, he shall not be appointed to fill any vacancy in the supreme or superior courts for four years. The judge must seek approval from the judicial district to which he was originally appointed, unless, with his consent, he has been assigned to another district in which case he must seek approval in the district where he has served the major portion of his term, or where he last stood for election. Provisions for filing are carefully spelled out.

Compensation for superior court judges is fixed at \$19,000 per year, under the same general provisions for supreme court justices. Eight superior court judges are provided, two from the first judicial district (Juneau and Ketchikan); one from the second judicial district (Nome); three from the third judicial district (Anchorage); and two from the fourth judicial district (Fairbanks). Also provision is made for temporary assignment by the chief justice of any judge to a district other than his own to meet exceptional work loads in any district.

It had been expected that the act creating the Alaska judiciary would not become operative until January, 1962, by which time the federal government would have withdrawn all but one of the district courts, reserving that one for handling federal cases for the District of Alaska. Thus Article III of the judiciary act dealt with organization, and transfer of cases with an eye on preliminary work to be done before that date. However, it contained a saving clause declaring that in the event a court of competent jurisdiction, by final judgment, or the President of the United States by executive order terminates the jurisdiction of the District Court of the State of Alaska and denies its jurisdiction, the organi-

zation of the supreme court and one or more of the eight district courts should proceed forthwith.

This is exactly what happened. Hence, the second of the three acts relating to the organization of the Alaska judiciary was introduced and passed. This amended the first act to provide for the immediate organization and jurisdiction of the supreme court.

The judicial council appointed at the legislative session convened and made the necessary nominations from which the gubernatorial appointments were to be made and Alaska's Supreme Court came into being in the summer of 1959. The organization of the superior court followed in due course and all eight district judges have been appointed, and have named most of the judges for the magistrates court. The judges have undergone intensive and on-the-spot training in the courts of New Jersey, whose judiciary most nearly approaches Alaska's. The transition from federal to state courts is ready for final accomplishment. The transition was delayed by the request of the Justice Department, so far as superior courts are concerned, until the judge of the United States District Court for Alaska had been appointed by the President and approved by Congress.

However, an enormous volume of work has already been done by the supreme court. Its responsibilities for rule drafting has been accomplished in the production appellate rules, criminal rules, civil rules and administrative rules applicable to all state courts, and a handbook of instructions for magistrates and deputy magistrates. All these rules represent the most modern judicial thought. The civil and criminal rules embody the general rule of federal procedure, an integral part of the procedures of the federal district courts already in use.

C. LOWER COURTS

The judiciary article of the constitution provided merely that a system of lower courts be set up. The legislature met this constitutional requirement by the creation of the magistrates courts. In general these will absorb most of the functions of the old United States Commissioner's Courts and the municipal courts. They are under the direct supervision of the superior courts. On the order of justice courts in existence in other states, these courts have jurisdiction over minor civil suits and misdemeanors. Unlike the United States Commissioner's Court they do not have jurisdiction over probate and guardianship for minors and incompetent persons. Also, unlike these courts, a definite salary is fixed for the magis-

trates and they need not depend for their remuneration upon fees collected.

The law provides for magistrates and deputy magistrates to be appointed by the judges of the districts in which they serve. An innovation is the traveling magistrate who works in a circuit covering several communities too small to have a full time deputy magistrate. Such communities are numerous in Alaska. The number of magistrates and deputy magistrates and the communities they serve is definitely spelled out in the act, but the law is flexible in that it can be changed by the supreme court. Though appointed by the district judge, magistrates may be removed for incapacitation by the supreme court if the district judge fails to act.

Compensation for district magistrates is fixed at \$10,000 per year, but salaries of deputy magistrates, who serve in smaller communities, and of traveling magistrates are determined by the supreme court. Per diem is allowed for work in travel status. The schedule of duties set up for deputy magistrates is limited to those formerly and presently performed by United States Commissioners, except as specifically provided otherwise by law or by rule of court. The right of appeal to the superior court is preserved. All appeals shall be tried de novo.

III. CONCLUSION

Thus the Alaska judiciary as presently set up is a unified court system with the line of authority firmly fixed, both by statute and by court rules, running from the highest to the lowest branch of the judiciary. Speedy action for litigants is assured at a minimum of expense. Jurisdictional disputes have been eliminated by rules that firmly establish functions at each level, and the training of magistrates and deputy magistrates, most of whom will be without legal background, is aided by a detailed manual, assuring uniformity of procedure throughout the state.

The creation of the Alaska judiciary is the product of many forces. In writing the Judiciary Article of the Alaska Constitution, the delegates to the convention had the benefit of the Public Administration Service, of Chicago, a non-profit organization, which was retained by the Alaska Statehood Committee to prepare constitutional studies and a manual of procedure for the delegates. The same agency provided nationally known consultants who were constantly in attendance with the committees appointed to write the various articles of the constitution. The Judiciary Committee itself was composed of some of the best legal talent in Alaska. They were in daily consultation with representatives of the Alaska

Bar Association. They studied judiciary systems of other states of the Union with special emphasis upon the newly revised judicial systems of Missouri and New Jersey. The result was the judiciary article, considered by students of governmental matters as the best in the United States and apparently destined to be the model for revision scheduled in many states.

A similar situation prevailed at the first session of the Alaska State Legislature. The Judiciary Committee of the Senate had final authority for drafting the laws implementing the constitutional article, but long before the legislature met the Alaska Bar Association and PAS - at this time under contract with the Alaska Statehood Committee to take charge of transition studies for the new state - had turned out model bills embodying but not restricted to the major provisions of the laws as later enacted.

PAS also brought on to the scene Dr. Sheldon Elliot, of the New York University Law School, who had served as a consultant to the Judiciary Committee at the Constitutional Convention. Doctor Elliot had returned to Alaska as a special consultant for PAS on judiciary transitional matters, and his services were made available to the Alaska Bar Association by request. The legislation enacted was largely a composite of PAS and Bar Association thinking.

Other attorneys both in Alaska and stateside also rendered valuable service, but the chief credit for the model department of government must go to the delegates in the Constitutional Convention who set up the framework and the members of the first state legislature who enacted the implementing laws. Without their dedicated work neither the work of PAS or the Alaska Bar Association could have been fruitful.

It is a far cry from the court-less and justice-less Alaska in its first years in territorial status to the model judiciary under which the 49th state will operate. It will be interesting to see how theory and practice mesh when transition is accomplished. But whatever stiffness may develop in the machinery as it moves forward, Alaskans may be assured that they have built a state judiciary which is founded on the most advanced judicial concepts of the time. If the citizens of the state who have been given the responsibility for making it work, through the selection of qualified and able judges, discharge that responsibility, Alaska need feel no concern for the administration of justice in the 49th state.

BS.
NO MENTION OF THE CONSULTANTS
Rec to Not give the AK BAR
TOO MUCH STROKE!